SUPREME COURT, U. S.

NOV 12 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-571

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

against

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Indiana & Michigan Electric Company, respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on August 14, 1974, which granted respondents' petitions for rehearing and modified the court's main opinion of February 14, 1974.

Opinions and Order Below

The main opinion of the Court of Appeals and the order and opinion granting the petitions for rehearing and modifying the main opinion, neither of which is as yet reported, are reproduced in the Appendix,[1] at 16a and 1a, respectively.

Jurisdiction

The main opinion and judgment (16a) of the Court of Appeals were entered on February 14, 1974. A supplemental order and opinion (1a), granting respondents' petitions for rehearing and modifying the main opinion, were entered on August 14, 1974. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether an appellate court sitting in review of administrative agency action may exercise the extraordinary powers of a court of equity when that court's jurisdiction is derived solely from an enabling statute affording no such powers?

2. Whether an appellate court reviewing administrative agency action by virtue of a specific statutory grant may fashion a remedial order which has the effect of doing indirectly that which the enabling statute forbids the agency itself from doing directly?

1. Citations with suffix "a" are to the Appendix.

3. Whether an appellate court whose scope of review is specifically limited by statute to affirming, modifying or setting aside, in whole or in part, the order of an administrative agency may, upon determining that the agency has violated its enabling statute, do more than merely lay bare the error and remand the case to the agency?

Statutes Involved

This petition involves issues which are required to be resolved under Sections 205, 206 and 313 of the Federal Power Act, pertinent portions of which are set out in the Appendix (51a, 53a and 54a), respectively.

Statement of the Case

The jurisdiction of the court below was invoked pursuant to §313(b) of the Federal Power Act (the Act). 16 U.S.C. §8251(b).

Petitioner, Indiana & Michigan Electric Company (I&M) is an electric utility engaged in the generation, transmission and distribution of electric energy for sale both at wholesale for resale and at retail. The Federal Power Commission has asserted jurisdiction over I&M's wholesale for resale sales. *Indiana & Michigan Electric Co.*, 33 FPC 739 (1965), *aff'd* 365 F.2d 180 (7th Cir.), *cert. denied* 385 U.S. 972 (1966).

A. Proceedings Before the Commission

This proceeding had its origin in the filing with the Federal Power Commission (FPC) by I&M on June 13, 1972 of proposed increases in rates and charges to its

wholesale customers. In that filing, I&M specified an effective date of July 14, 1972 for the increases, in compliance with the 30-day maximum notice period provided in Section 205(d) of the Act. 16 U.S.C. §824d(d).

On July 3, 1972, the Secretary of the FPC wrote to I&M, acknowledging its June 13, 1972 filing, but stating that August 13, 1972 would be the earliest date on which the proposed increases could be made effective under Section 35.13(b)(4)(i) of the FPC's regulations. 18 C.F.R. §35.13 (b)(4)(i). That section required that, whenever a utility filed a proposed rate increase, certain cost-of-service data, a summary of the proposed rates and comparative billing analyses be filed at least 60 days prior to the proposed effective date.[2]

On July 18, 1972, I&M moved the FPC for an order fixing July 14, 1972 as the effective date of its proposed rate increases. Various intervenors before the FPC filed responses which opposed I&M's requested effective date and, in addition, urged the imposition by the FPC of a maximum five-month suspension of the proposed rates, invoking Section 205(e) of the Act. 16 U.S.C. §824d(e).

On August 11, 1972, FPC issued its order (28a) accepting I&M's rates for filing, rejecting I&M's proposed effective date of July 14, 1972, setting August 13, 1972 as the effective date of the said rates and suspending the effective date of the proposed rates and charges for a full five months from August 13, 1972, thereby rendering the rates

2. Section 35.13(b)(5) of the FPC's Regulations (18 C.F.R. §35.13(b)(5)) similarly requires a 60-day pre-filing of the utilities' testimony and exhibits in support of a proposed rate increase.

effective and collectible subject to refund on and after January 13, 1973. Thereafter I&M applied for rehearing, and, in its order of October 6, 1972 (39a), the FPC denied that application.

On December 5, 1972 I&M petitioned the Court of Appeals for the District of Columbia Circuit to review the FPC's orders of August 11, 1972 and October 6, 1972.[3]

B. The February 14, 1974 Opinion of the Court of Appeals

On February 14, 1974, the Court of Appeals, in an opinion by Judge Wilkey (16a), held that the FPC had exceeded its statutory authority by promulgating Section 35.13(b)(4)(i) of its Regulations, insofar as that Section required the effective date of I&M's rate filing to be delayed beyond the 30-day limit specified in Section 205(d) of the Act. In addition, the court declared the FPC's August 11, 1972 order to be *ultra vires* and a nullity since it purported to suspend I&M's rates and charges after they became effective on July 14, 1972. The February 14, 1974 opinion pointed out that Section 205(d) of the Act has been construed as creating not only a minimum notice period for the FPC and the utility's customers, but also a maximum waiting period for the filing utility. Since the FPC had not issued its suspension order within the prescribed period, the court concluded that the increased rate had taken effect without being subject to suspension or refund.

3. Other aspects of the two orders were also brought on for review by certain of I&M's customers. The resolution of those issues do not affect the matters involved in this Petition. *See, Richmond Power and Light* v. *FPC*, 156 U.S. App. D.C. 315, 481 F.2d 490 (D.C. Cir.), *cert. denied sub nom. Indiana & Michigan Electric Co.* v. *Anderson Power and Light*, 414 U.S. 1068 (1973).

Accordingly, the court vacated the suspension order and remanded the proceeding to the FPC with instructions that I&M's June 13, 1972 rate filings were to be made effective as of July 14, 1972.[4]

C. The August 14, 1974 Order and Opinion of the Court of Appeals

On February 28, 1974, the FPC and various intervenors filed petitions for rehearing. By order and opinion dated August 14, 1974 (1a), the court below granted those petitions and while adhering to its main opinion insofar as it had held that the FPC exceeded its authority in suspending I&M's rates after they became effective, nevertheless modified the main opinion to alter totally its legal impact.

At the outset of its August 14, 1974 opinion, the court noted that the Act rendered the FPC powerless to correct any alleged inequities arising from the court's February 14, 1974 decision.

> "Under our main opinion, which renders the Commission's 11 August 1972 suspension order a nullity, the Commission's hearings on the reasonableness of I&M's rates cannot rest on the authority of section 205(e), but rather on section 206(a), and thus the Commission does not have the correlative power to order refunds pursuant to section 205(e). Consequently, the Commission's hearings can continue only under the authority of section 206(a), and this unambiguously provides that 'the Commission shall determine the just and reasonable rate * * * to be *thereafter* observed

4. The court below was fully aware in its February 14, 1974 opinion that the effect of its opinion would be to permit I&M to charge its affected customers at the increased rates for the six-month period from July 14, 1972 to January 13, 1973 (19a and fn. 8 at 19a).

> and in force, and shall fix the same by order.' The Supreme Court has interpreted this language as precluding the Commission from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable." (5a-6a)

However, in spite of the fact that the court's opinion made it clear that prospective relief was the only remedy permitted under the express provisions of the Act on the facts here presented, the court exercised what it claimed were its inherent equity powers to invest the FPC with a suspension power and a refund power—both of which the court had held were expressly denied to the FPC by the Act. To reach its conclusion the court was required to resolve two issues: first, whether the equities of this case were sufficiently compelling to justify the exercise of inherent equity powers, and second, whether it was vested with such powers when reviewing actions of the FPC.

The court concluded first, that its prior decision had resulted in a hardship of sufficient magnitude to require intervention by an equity tribunal (3a-7a) and second, that it was vested with inherent equity powers to correct the actions of the FPC (7a-13a). While recognizing that the FPC was "statutorily powerless to correct these inequities" (2a), the court below pointed to this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939) to support its conclusion that it, sitting in review of the FPC's action, is vested with such powers. It proceeded to invoke those powers to do that which it conceded the FPC was statutorily powerless to do, *i.e.*, to issue an order the effect of which was to suspend a rate increase after it had become

effective, thereby imbuing the FPC with the concomitant power to order refunds, a power which the FPC lost when it failed timely to suspend.

Accordingly, the court modified its main opinion by ordering that I&M could not collect its rate increases for the five-month period following the July 14, 1972 effective date and that, although I&M could charge the increased rates for the period from December 14, 1972 through January 13, 1973, those charges and all other collections attributable to the increases would be subject to refund should the FPC ultimately find such increases unreasonable or not in the public interest (3a).

Reasons for Granting the Writ

The argument that follows demonstrates: (1) that the opinion of the court below misinterpreted applicable decisions of this Court in deciding an important question of federal law which has not been, but should be, unequivocally settled by this Court; (2) that the opinion below conflicts in principle with decisions of this Court; and (3) that the opinion below so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory power.

POINT I

The opinion below misinterprets this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939).

The Court of Appeals, in its August 14 opinion, interpreted this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939) as meaning that, when called on to review orders of the FPC, it was invested with the powers of a court of equity. The decisions cited do not stand for the proposition asserted. It is abundantly clear both from *Ford* and *Morgan* and from the very nature of our federal judicial system of limited powers that the court below, when reviewing orders of the FPC, is endowed with only such powers as Congress granted to it in Section 313(b) of the Act. Nowhere in that Section of that statute did Congress grant equity powers to courts of appeals. Accordingly, since Congress did not grant equity powers to the court below, it exceeded its authority and its jurisdiction by exercising such powers.

The federal courts, and more specifically the courts of appeals, are courts of limited jurisdiction which have no power or jurisdiction other than that conferred upon them by Congress. *Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 440 (1850); 1 Moore's, Federal Practice ¶0.60 [3] (2d ed.). This proposition is derived from Article 3, Section 1 of the Constitution which states, "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain."

While Congress, in Section 11 of the Judiciary Act of 1789, 1 Stat. 82, provided that the circuit courts shall have "cognizance * * * of all suits of a civil nature at common law or in equity" in cases appropriately brought, this provision does not mean that a court of appeals possesses the full panoply of equitable powers in all cases. Quite to the contrary, it merely means, when analyzed correctly, that the federal courts are courts of general equity jurisdiction and may exercise equitable powers in those equitable actions which are otherwise within their jurisdiction. See *Atlas Life Ins. Co.* v. *W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939); *Briggs* v. *United Shoe Machinery Co.*, 239 U.S. 48, 50 (1915); *Rees* v. *Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873); *Delaware* v. *Hodson*, 265 F. Supp. 308, 309 (D. Del. 1967); *Jackson* v. *United States Nat'l Bank*, 153 F. Supp. 104, 108 (D. Ore. 1957).

The Judiciary Act is not an independent source of jurisdiction. In all cases, in order for the federal courts to exercise equitable powers, there must be an independent statutory basis of jurisdiction which gives rise to those powers. In the instant case, the independent basis for the Court of Appeals' jurisdiction is Section 313(b) of the Act, 16 U.S.C. §825l(b), which provides,

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the

> application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

By this section, Congress granted the Court of Appeals jurisdiction to review orders of the FPC, but the jurisdiction conferred is precisely detailed and severely circumscribed. The court is given only the power to "affirm, modify, or set aside such order in whole or in part."[5] *Id.* It is not granted any broad equitable powers such as the power to grant injunctions and restraining orders (see, *e.g.*, §§314 and 317 of the Act which invest these powers in the district courts) or the power to issue such orders as to it may seem just and proper (see, *e.g.*, §10(e) and (f) of the NLRA, 49 Stat. 454, 455). Therefore, although Section 313(b) of the Act provides an independent basis for the court's jurisdiction, Congress made it abundantly clear that a court of appeals reviewing FPC action under that section sits as a court of law rather than as a court of equity. It follows that the exercise of equitable powers in a Section 313(b) proceeding is without Congressional authority.

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5. Even this limited jurisdiction is confined and restricted. See Point III, *infra*, at 23.

Nevertheless, the court below exercised the extraordinary powers of a court of equity to fashion an order, the effect of which was to provide a remedy which is expressly denied by the Act to both the court and the FPC. The court below, both in its main opinion and its opinion on rehearing, expressly held that the FPC was, under the terms of the Act, powerless to suspend I&M's proposed rate increases after they became effective on July 14, 1972 (27a). Despite that holding, the court has, in effect, suspended I&M's rate increases some 25 months after they became effective on July 14, 1972.

In addition, both the main opinion of the court below (fn. 35 and text at 27a) and the opinion on rehearing expressly held (5a) that, once the FPC lost the power to suspend I&M's proposed rate increases, it was likewise without power to place such rate increases under a refund obligation. Nevertheless, the August 14 order and decision granted the FPC the power to order refunds in disregard of the statute.

The court below believed that its remedial order was not entirely outside the contemplation of the Act (8a). It attempted to support and justify the impermissible result which it reached by relying on this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939). Those decisions, we submit, do not stand as authority for an appellate court, which is statutorily powerless to order a given remedy, to call upon some inherent equitable powers to achieve that which the enabling statute forbids. To rely on those cases for such a proposition distorts them beyond all proportion, because in each case Congress had specifically granted to the reviewing court the equity powers which it invoked.

A careful reading of the *Ford* opinion indicates that this Court held that a court reviewing action of the Labor Relations Board is, by virtue of specific wording in the pertinent judicial review section of the NLRA, vested with equity powers. Section 10(e) of the NLRA, unlike Section 313(b) of the Act here involved, endows a reviewing court with the power to,

> "* * * grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

In light of this clear grant of equity powers, allowing the court to fashion remedies as justice requires, the *Ford* Court concluded that the lower court could adopt an internal housekeeping shortcut which was consistent with the statutory scheme.

A proper reading of *Ford* results in the conclusion that reviewing courts under the NLRA are imbued with equity powers. This is a far cry from the proposition that all courts reviewing administrative action may exercise equitable powers to reach a result which is inconsistent with the essential features of a statutory scheme.

Yet the court below, in its August 14 opinion, so read this Court's decision in *Ford* relying on the following quotation from this Court's opinion:

> "*The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of*

> *the statute and without intruding upon the administrative province,* it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. * * * The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law." (emphasis supplied). *Ford, supra,* 373-74.

To infer from the quoted language, as did the court below, that it is vested when reviewing orders of the FPC with the powers of a court of equity, thus permitting it to fashion any remedy which it deems just under the circumstances, is clearly an improper reading of *Ford.* In the first instance, the *Ford* Court said, "the jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers" (*Id.* at 373), because the statute there involved specifically granted the reviewing court those powers. Section 10(e), NLRA. That specific statutory grant is a clear and unmistakable invocation of the powers of a court of equity, allowing the court great latitude in fashioning remedies as justice requires. Section 313(b) of the Act contains no such language and, therefore, cannot be said to invest the reviewing court with equity powers.

Likewise, the court below exceeded the limits of that portion of the *Ford* opinion which reads, "* * * while *the court must act within the bounds of the statute* and without intruding upon the administrative province, it may adjust

its relief to the exigencies of the case" (emphasis added) *Ford, supra*, 373. The court below asserted,

> "[W]e are acting, *we believe* 'within the bounds' of the Federal Power Act; indeed, our main opinion promotes the Act by confining the Commission to its statutory authority, and this supplemental opinion is designed to advance the policies and procedural safeguards of section 205 of the Act." August 14, 1974 opinion, 8a. (emphasis supplied)

Clearly the court was not acting within the bounds of the Act. It had held that Section 205 of the Act forbids the suspension of rates which have become effective, and both the February 14 and the August 14 opinions stated unequivocally that I&M's rate increase had become effective on July 14, 1974. Nevertheless, the court retroactively "suspended" I&M's rate increase.

Furthermore, the court itself recognized in both of its opinions that Section 206 of the Act, rather than Section 205, was the sole dispositive statutory provision in the instant proceeding (5a-6a and 25a-27a). Section 206 provides no suspension or refund powers, its only effect being to afford prospective relief in appropriate cases. In spite of this, the Court of Appeals issued a retroactive suspension order and bestowed upon the FPC the concomitant power to order refunds, thereby not only failing to act within the boundaries of the enabling statute, but also violating the essential features of that statute by exercising powers which neither it nor the FPC possessed.

Beyond this, while the court below recognized that under *Ford* it could not permissibly intrude "upon the adminis-

trative province" (*Ford, supra,* at 373-74), the court below did precisely that, and this subject will be discussed more fully at Point II, *infra.*

For all of the foregoing reasons, it is readily apparent that the Court of Appeals' reading of the *Ford* opinion was erroneous, at least insofar as it derived its claimed inherent equitable powers from that source. The *Ford* opinion lends no support whatsoever for the court's August 14 decision, and, quite to the contrary, shows that the court exceeded its authority.

The *Morgan* case is equally unsupportive of the exercise of equity powers by the court below. A cursory reading of that decision establishes that this Court merely held that a court which has previously exercised its equitable jurisdiction in a statutorily-mandated injunctive proceeding might continue to exercise equity powers to prevent an abuse of the court's process.

Therefore, *Morgan* and *Ford* are similar in that they both condone the exercise of equity powers by a court reviewing administrative agency action, only when, and to the extent, such powers have been statutorily granted by Congress. *See also Inland Steel Co.* v. *United States,* 306 U.S. 153 (1939) (where, as in *Morgan,* this Court sanctioned the use of equity powers to prevent distribution of funds accumulated solely by virtue of the court's process in a statutory, injunctive proceeding).

The instant case, however, is unlike *Ford, Morgan* and *Inland Steel.* Nowhere in the Act is the court given equitable powers of any kind. There is no provision in §313(b)

which grants the power to issue "such temporary relief or restraining order as it deems just and proper" (§10(e) and (f) of the NLRA) as was present in *Ford*. Nor is there a clause allowing the court, in its discretion, to "restrain or suspend, in whole or in part, the operation of the Commission's order" as was present in *Inland Steel, supra*, at 156.

There is additional case law which supports the conclusion that the instant case precluded the exercise of equitable powers or the grant of equitable remedies by the court below. *See, e.g., FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582-83 (1949) (where this Court, relying on *Morgan* and *Inland Steel*, made clear that equitable powers exercised there were derived solely from the enabling statute and not from any amorphous, inherent equity powers) and *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U.S. 301 (1935) (where, in an equity action for restitution, brought pursuant to statute, this Court concluded that equitable relief was inappropriate).

Likewise, the Third Circuit decision in *Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899 (3rd Cir.), petition dismissed on petitioner's motion, 345 U.S. 988 (1953), a case much relied on in the August 14 opinion, does not support the exercise of broad equitable powers to remedy administrative error. In *Mississippi*, the court ruled that the FPC had exceeded its statutory authority in summarily rejecting a proposed rate increase without a hearing. To remedy the error, the court ordered that the increased rate take effect, subject to refund, as of the date of its refiling. This conclusion was mandated because the maximum 30-day no-

tice period and five-month suspension period had both elapsed as a result of the FPC's error.

The ultimate effect of the Third Circuit decision was not, as the August 14 decision alleges, to require a retroactive *de facto* suspension of several months. The decision merely allowed the new rate to take effect at the earliest possible moment that the statute would allow. The court could not order the rate to be retroactively effective because, unlike the present case where the FPC's error took place after the rate had taken effect, the error there, having occurred before the proposed effective date, prevented the rate increase from ever becoming effective without a subsequent refiling.

The *Mississippi* decision, therefore, does not support the proposition that a court reviewing orders of the FPC may exercise equitable powers to alter a statutory command. Quite to the contrary, that case supports the conclusion that a court which lays bare an error by the FPC must, because of the absence of a grant of equitable powers, stay within the boundaries of the Act in fashioning any remedial order. *Accord, Tennessee Valley Municipal Gas Ass'n.* v. *FPC,* 470 F.2d 446 (D.C. Cir. 1972) (a case cited by the court as authority for its February 14 order and conspicuous by its absence in the August 14 opinion); *but see, Montana Power Co.* v. *FPC,* 330 F.2d 781 (9th Cir. 1964) (an aberrational decision with no common law or statutory authority for the result reached).

The foregoing argument conclusively demonstrates that the court below, in reviewing the orders of the FPC, does not sit as a court of equity because the statute affording

the jurisdictional basis for the review power specifically withholds from the court any equity powers. Since, in the instant case, §313(b) of the Act authorizes solely the exercise of powers of a court of law, it is evident that the Court of Appeals exceeded its jurisdictional and statutory authority by exercising the powers of an equity court.

The conclusion reached by the court below in its August 14 decision resulted from a serious misreading of this Court's decisions in *Ford* and *Morgan*. The importance of reversing the erroneous decision below lies in the fact that it fosters the conclusion that the judicial branch may expand its own jurisdiction with impunity. At the same time, that decision permits the judicial branch to employ the very administrative remedies which Congress has seen fit to withhold both from the FPC and the courts. That such powers should accrue to the federal courts as the result of a misinterpretation of this Court's decisions would be an anomalous result.

POINT II

The opinion below conflicts in principle with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

Section 205(e) of the Act, 16 U.S.C. 824d(e), authorizes the FPC to suspend proposed rate increases pending a hearing on their reasonableness:

> "[P]ending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may

> suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect. * * *"

It is well-established that the FPC's suspension power is absolute and exclusive and the court below so held (10a); *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F.2d 1242 (D.C. Cir. 1972).

Nevertheless, in spite of the axiomatic nature of the proposition that the Act vests exclusive suspension powers in the FPC, the Court of Appeals here issued an order, the effect of which was retroactively to suspend a rate increase more than two years after it had become effective; clearly, the FPC was itself statutorily precluded from imposing such a result. The August 14 opinion had the additional effect of impermissibly extending the 30-day maximum waiting period for a filing utility under Section 205(d). The court below recognized the inflexible nature of this provision when it said,

> "The Supreme Court has interpreted this language to create not only a *minimum notice period* for the utility's customers and the Commission, but also a *maximum waiting period for the filing utility.* (citing *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958)). * * * Thirty days is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power." (February 14, 1974 opinion at 23a-24a; *see also, Id.* at 26a, and cases cited at fn. 34.)

This Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963) indicates that

the August 14 opinion constituted an impermissible intrusion into the administrative domain and exceeded the court's authority. In *Arrow*, which arose under analogous portions of the Interstate Commerce Act, the ICC suspended for the maximum seven-month period a certain schedule of reduced railroad rates on multiple-car grain shipments. At the end of the seven-month suspension period, the ICC had not completed its investigation into the lawfulness of the rates, and suit was brought to enjoin the implementation of the proposed rates pending the ICC's decision thereon.

The District Court concluded that the ICA vested exclusive suspension power in the ICC and that it lacked jurisdiction to grant injunctive relief extending the period of suspension. The Court of Appeals for the Fifth Circuit affirmed noting that,

> "Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power." 308 F.2d 181, 186.

This Court affirmed, holding that Congress not only intended to vest ICC with exclusive power to suspend proposed rate changes, but also intended to withdraw from the courts any pre-existing power to grant equitable relief. Therefore, the Court held, the federal courts have no power to extend the suspension period beyond the time which Congress specified. *Arrow*, *supra*, at 667-69. The Court pointed out that judicial interference with the suspension power would be a clear violation of the Congressional mandate.

> "This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. *The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the timing of rate changes which would be out of harmony with the uniformity of rate levels fostered by the doctrine of primary jurisdiction.*" (emphasis added) *Id.* at 668.

See also United States v. *SCRAP*, 412 U.S. 669 (1973); *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U.S. 264 (1933).

In conclusion, it is apparent that the August 14 opinion conflicts, if not directly, then in principle, with this Court's decision in *Arrow*. The Court's intervention is required here to prevent further judicial interference with the rate-making and rate-suspending powers exclusively granted by Congress to the FPC. A failure to review the erroneous decision below will not only play havoc with established norms of judicial review of administrative agency action, but will also be conducive to the notion that the FPC and other administrative agencies may act haphazardly, confident that the reviewing courts will, by exercising ombudsman-like jurisdiction, find methods to grant to them the very powers which were denied them by Congress.

POINT III

The opinion below represents such a clear departure from the permissible scope of administrative review as to require the exercise of this Court's supervisory power.

The scope of judicial review of the Court of Appeals when reviewing action taken by FPC is severely circumscribed by Congress, Section 313(b) of the Act, to the power only to "affirm, modify or set aside in whole or in part" an FPC order. *Id.*

This Court's decision in *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952) outlines with great precision the exact boundaries of a reviewing court's power under Section 313(b). In *Idaho Power*, the appellate court had specified the exact modifications to be made in an FPC order which had been declared invalid. This Court's decision, delivered by Mr. Justice Douglas, reversed saying,

> "But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37.
>
> The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part,' §313(b). But that authority is not power to exercise an essentially administrative function. See *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 373-374; * * *" *Id.* at 20-21.

The Court's reference to *Ford* demonstrates that even when a court was statutorily vested with equity powers, it was unable to engage in essentially administrative functions.

The decision below violates the unambiguous meaning of *Idaho Power*. The court's function ceased when it laid bare the administrative error by issuing its February 14 opinion. At that time the court's statutory obligation had been fulfilled and it could do no more. Nevertheless, the Court of Appeals, being dissatisfied with the prospective remedies provided by Congress in Section 206 of the Act, ordained retroactive relief of a type which the FPC itself could not award.

The very nature and function of a court reviewing administrative agency action precludes the ordering of that which the agency itself may not order. Such a reviewing court has the limited function of enforcing the provisions of the enabling statute by ensuring that the agency complies with them. See *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973). It can do no more to carry out the statute's intent than that which the statute authorizes. In *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623-24 (1927), the principle was stated as follows:

> "It [the FTC] has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order *is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission*; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

See also Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

The decisions in *Alaska Steamship Co.* v. *FMC*, 362 F.2d 406 (9th Cir. 1966) and *Phillips Petroleum Co.* v. *FPC*, 227

F.2d 470 (10th Cir. 1955), *on remand* 15 FPC 1116 (1956), both demonstrate the proper course of review in like circumstances. In each case the agency failed to suspend rates because it was under a legal misconception as to certain procedural requirements. The result in each case was to allow certain rates to become effective that would not have been effective had it not been for agency error. In each case, the court recognized that its function ceased upon a finding of agency error. The remedies enacted by Congress were permitted to take their prescribed course in each case so that in *Alaska* the new rate took immediate effect, not subject to refund, and in *Phillips* the company was permitted to collect its rate retroactively as of the original effective date. In neither case did the court attempt, as here, to circumvent the Congressional mandate.

The foregoing analysis demonstrates that the Court of Appeals' decision so far departed from the accepted and usual course of administrative review as to require the interposition of this Court. As the late Justice Frankfurter pointed out,

> "The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' * * * Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 136 (1940).

By legislating administrative remedies which Congress has chosen to withhold, the court below evidenced a disregard of this principle.

Conclusion

The opinion below misconstrues this Court's decisions in *Ford* and *Morgan*, neither of which supports the invocation of "inherent equity powers" on the facts here presented. Review by this Court is necessary to preserve the integrity of its decisions.

Likewise, the Court of Appeals' opinion flies in the face of the unambiguous principles enunciated in *Arrow*. This Court's intervention is required not only to prevent further judicial incursions into the administrative domain, but also to restore the authority of its decisions in this field.

Finally, the opinion below represents an unauthorized expansion of the jurisdiction of the federal courts. The court below, without statutory authority, legislated an administrative remedy under the guise of the exercise of equity jurisdiction. In doing so, the court so completely disregarded accepted norms of judicial conduct as to warrant the interposition of this Court's supervisory powers.

We take the liberty of suggesting that, should this Court consider the errors below so clear as not to require the Court to place this case on its calendar for oral argument, this matter could be effectively handled by summary reversal with appropriate directions to the court below to reinstate its judgment of February 14, 1974 *in toto*.

Respectfully submitted,

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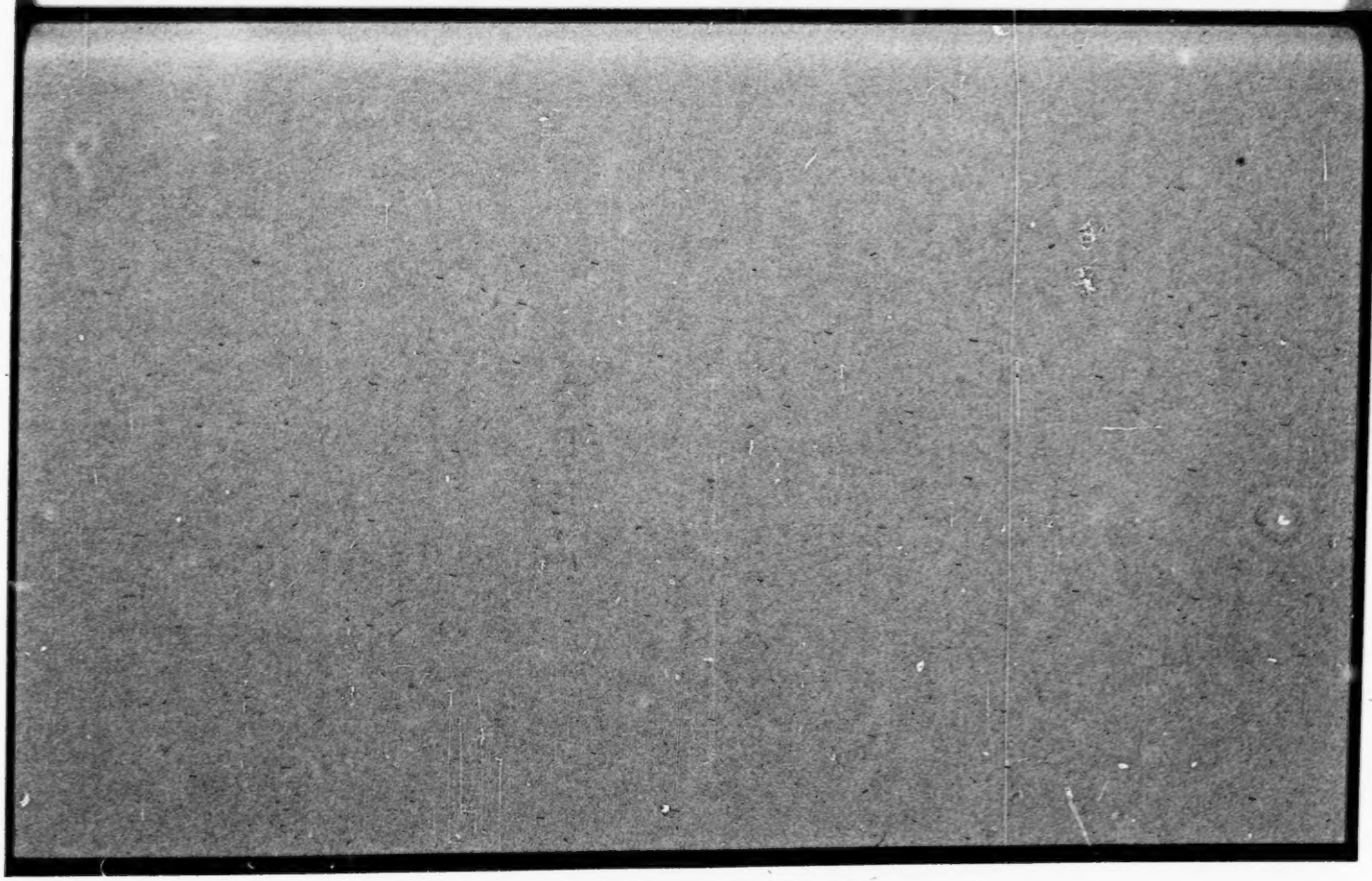
November 12, 1974



Order and Opinion of the Court of Appeals Dated August 14, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2168

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

RICHMOND POWER & LIGHT OF THE CITY OF RICHMOND, INDIANA
INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION
ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA, *Intervenors*

On Petitions for Rehearing

Filed 14 August 1974

Before: BAZELON, *Chief Judge*, ROBINSON and WILKEY, *Circuit Judges*

ORDER

On consideration of the petitions for rehearing, it is

ORDERED by the Court that the petitions for rehearing are granted and the opinion filed on 14 February 1974 is

modified in the manner set out in the third paragraph of the opinion of this Court filed herein this date.

Per Curiam

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The Commission, with the support of intervenors, has filed a petition for rehearing in which it requests that we modify our main opinion of 14 February 1974 by eliminating therefrom our holdings: (1) that the Commission's five-month suspension of the rates filed by Indiana & Michigan Electric Co. (I&M) must be vacated; and (2) that I&M is entitled to collect from its customers the difference between its filed rates, which now must be deemed lawful from their effective date, and the rates actually charged for the six-month period from 14 July 1972 to 13 January 1973.

In our main opinion we explained in Parts III and IV why under section 205 of the Federal Power Act the Commission does not have authority to suspend filed rates after a proper proposed effective date, a conclusion with which both majority and dissenting members of the Commission agreed. Since we have held that the effective date was 14 July 1972, the Commission suspension order of 11 August 1972 could have had no effect. It has been forcefully argued to us that, while this is statutorily correct, yet great inequities are likely to result. Even though the Commission is statutorily powerless to correct these inequities, we are urged to exercise our equity powers as a court to mitigate these hardships, or at least place the Commission in such posture as to be able to do so on the basis of evidence and findings later to be heard and made on the justness and reasonableness of I&M rates.

After scrutinizing the various memoranda submitted in connection with this petition,[1] we have decided to adhere to our holding that the Commission exceeded its authority when it suspended I&M's rates for five months. However, we deem it appropriate to exercise our equity powers and modify our earlier order in the following manner:

1. I&M may not collect retroactive rate increases for the five-month period from the effective date of its rate filing, 14 July 1972, through 13 December 1972.

2. I&M may collect the difference between its old and new rates for the period from 14 December 1972 through 13 January 1973.

3. Should the Commission determine during the course of its current hearings that I&M's filed rates are unjust or unreasonable, it may order I&M to refund the amounts collected after 13 December 1972 in excess of the just and reasonable rates.

I. *Equitable Factors*

Under our original order, I&M's customers would be obligated to pay retroactive rate increases for the five-month period during which the Commission's unlawful suspension order was in effect. This would create considerable hardship for I&M's customers, for, in reliance on the Commission's suspension order, they failed to seek increases in their own rates to offset I&M's increased

1. Richmond Power and Light and Anderson Power and Light filed memoranda in support of the Commission's petition. The Indiana and Michigan Municipal Distributors Association (IMMDA) and the City of Auburn, Indiana, a member of the IMMDA, submitted separate petitions for rehearing. In addition, the IMMDA filed a suggestion for rehearing *en banc*. I&M filed a reply memorandum.

charges. Since I&M's customers are precluded by federal law[2] and the relevant state statutes[3] from retroactively raising their rates, our original order would force them to absorb out of their own current assets the five months of retrospective increases in I&M's rates. These substantial amounts[4] would impose a significant burden on the finances of I&M's customers.[5]

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2. *See FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962); *State Corp. Comm'n* v. *FPC*, 215 F.2d 176, 184 (8th Cir. 1954). These cases interpreted section 4 of the Natural Gas Act, 15 U.S.C. §717c (1970), which is virtually identical to section 205 of the Federal Power Act, 16 U.S.C. §824d (1970).

3. *See* IND. STAT. ANN. §8-1-2-42 [§54-317] (Burns [Code Ed.] 1973); MICH. STAT. ANN. §22.13(6a) (Callaghan '1974 Supp.). Under MICH. STAT. ANN. §22.13(6) (1970), municipally-owned utilities are not subject to the jurisdiction of the Michigan Public Service Commission. Therefore, it is not clear on the face of the Michigan statutes whether the municipally-owned, Michigan customers of I&M could increase their rates retroactively.

4. The estimated cost to I&M's municipal customers for the six-month period 14 July 1972 through 12 January 1973 is $2,601,951. Affidavit of Fred R. Saffer, 26 February 1974, attached to IMMDA Suggestion for Rehearing En Banc.

5. In an affidavit attached to the IMMDA Suggestion for Rehearing En Banc, the Chairman of the Board of Public Works of Fort Wayne, Indiana, represented:

> That in the event the Court's opinion remains unmodified with respect to requiring that Indiana & Michigan Electric Company's June 13, 1972, rate filing should become effective as of July 14, 1972, the sum required to be paid for the period of July 14, 1972, through January 13, 1973, will amount to approximately Four Hundred Seventy Thousand Dollars ($470,000.00), the payment of which will cause considerable hardship to the City of Fort Wayne. The City will be unable to adequately maintain its system as by law required as a direct result of being required to make such payment. The City cannot recover this $470,000 payment since the City's rates were not increased for this item and cannot be increased retroactively.
>
> * * *
>
> That if the Court's opinion remains unmodified, the impact on the financial condition of the City of Fort Wayne's City Light and Power Utility will be extremely detrimental in that said City will have to absorb the increased rates without having the ability to raise its retail rates to provide for these additional past costs.

In addition, I&M's customers have been paying the higher rates provided for by I&M's new tariff schedule since 13 January 1973. Those rates are now subject to scrutiny in Commission hearings to determine whether they are just and reasonable. Our main opinion would deprive the Commission of authority to order refunds by I&M to its customers in the event the Commission finds that some portion of I&M's increases are unjustified. The Commission's power to order refunds arises from section 205(e) of the Federal Power Act[6] and is directly tied to the exercise of the Commission's suspension power. Under section 205(e), if the Commission suspends a filing utility's rates and orders hearings on their justness and reasonableness, if those hearings overrun the suspension period, and if the filed rate increases are found unreasonable, the Commission may "by further order require [the filing] public utility or public utilities to refund, with interest, . . . such portion of [the] increased rates or charges as by its decision shall be found not justified."

Under our main opinion, which renders the Commission's 11 August 1972 suspension order a nullity, the Commission's hearings on the reasonableness of I&M's rates cannot rest on the authority of section 205(e), but rather on section 206(a), and thus the Commission does not have the correlative power to order refunds pursuant to section 205(e).[7] Consequently, the Commission's hearings can continue only under the authority of section 206(a), and this unambiguously provides that "the Commission shall determine the just and reasonable rate . . . to be *there-*

6. 16 U.S.C. §824d(e) (1970).

7. *See* note 35 and accompanying text of the 14 February 1974 opinion in this case.

after observed and in force, and shall fix the same by order.'"[8] The Supreme Court has interpreted this language as precluding the Commission from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable.[9] Under our main opinion, then, I&M's customers would be forced to pay possibly excessive rates from 13 January 1973 until the conclusion of the Commission's ongoing hearings without any prospect of receiving refunds of the excessive amounts paid.

Our concern about the liability of I&M's customers for retroactive rate increases, and payment by those customers of possibly unreasonable rates without right to refunds, is intensified by the fact that the Commission explicitly found in its 11 August 1972 order that I&M's filed rates may be unjust or unreasonable. The Commission stated:

> The proposed rates and charges . . . have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. It has also been alleged that I & M's proposed tariff changes are contrary to the economic stabilization program and antitrust policies and that interchange of energy should be provided for. It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in

8. 16 U.S.C. §824e(a) (1970) (emphasis supplied).

9. *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 254 (1951). *See also Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 389 (1959) (Natural Gas Act §5, 15 U.S.C. §717d (1970)); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944) (Natural Gas Act §5).

> I & M's proposed FPC Electric Tariff, and the use thereof deferred as hereinafter provided.[10]

Thus, the strong potential that hardship to I&M's customers could result from our main opinion is compelling.

Moreover, the equitable stake of I&M in our main opinion is not significant. I&M sought from the Commission no greater relief than our modified order now grants. In its application for rehearing before the Commission, I&M requested that the Commission

> [i]ssue a supplemental order modifying ordering paragraph (C) of its August 11, 1972 Order in this proceeding, so as to provide that I&M's proposed rate schedules are suspended for five months beginning July 14, 1972 and their use deferred until December 14, 1972 . . . .[11]

By modifying our original order in the manner set out above, we eliminate the potential for hardship to I&M's customers and we accord I&M precisely the relief it sought from the Commission. The equities clearly dictate that we reinstate the suspension of I&M's rates for the period from 14 July 1972 through 13 December 1972, and restore to the Commission its power under section 205(e) to order refunds of any amounts paid by I&M's customers after 13 December 1972 that the Commission finds excessive.

II. *The Court's Equity Powers*

A court sitting in review of an administrative agency is vested with equity powers which it may employ in a

10. Joint App. at 164.

11. *Id.* at 176. *See* note 34, main opinion, second paragraph.

manner defined by the Supreme Court in *Ford Motor Co.* v. *NLRB*:[12]

> [W]hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.[13]

By our exercise of equity powers herein, we are "adjust-[ing] [our] relief to the exigencies of the case in accordance with the equitable principles governing judicial action." In so doing, we are acting, we believe, "within the bounds" of the Federal Power Act; indeed, our main opinion promotes the Act by confining the Commission to its statutory authority, and this supplemental opinion is designed to advance the policies and procedural safeguards of section 205 of the Act.[14]

The Supreme Court's decision in *United States* v. *Morgan*[15] is instructive here. Under the authority of the Packers and Stockyards Act[16] the Secretary of Agriculture had declared the schedule of maximum rates charged for stockyard services unlawful and prescribed a new,

12. 305 U.S. 364 (1939).

13. *Id.* at 373.

14. 16 U.S.C. §824d (1970). The policy expressed in section 205(a) is to promote just and reasonable rates. *See Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 388 (1958) (Natural Gas Act). The procedural safeguards provided by section 205 include the Commission's suspension and refund powers. *See* text accompanying notes 6-7 *supra*.

15. 307 U.S. 183 (1939).

16. 7 U.S.C. §§181-229 (1970).

lower schedule of rates. Stockyard companies filed suit in District Court, which temporarily restrained the Secretary's order on condition that the stockyard companies deposit the amounts received in excess of the Secretary's prescribed rates with the clerk of the court. Ultimately, the Supreme Court held the Secretary's order invalid because the Secretary had failed to accord the stockyard owners the full hearing to which they were entitled under the Act.[17] On remand the District Court ordered that the fund accumulated by the clerk during the pendency of the suit be returned to the stockyard owners. The Supreme Court reversed. It directed the District Court to hold the fund that it had collected until the Secretary rendered a decision, after full hearings, on the lawfulness of the stockyard rates. If the Secretary again found the old rates unlawful, the District Court was instructed to distribute to stockyard customers the difference between the old rates and the lawful rates. The Court's basic rationale was as follows:

> Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates . . . .[18]

The Court so held although it conceded that the Secretary could prescribe lawful rates only for the future and

17. *Morgan* v. *United States*, 298 U.S. 468 (1936); 304 U.S. 1 (1938).

18. 307 U.S. at 194.

could not act with respect to charges collected in the past.[19] It reasoned that the Secretary had already found the stockyard rates unlawful, although he had done so in a procedurally defective manner. If the Secretary subsequently decided to reaffirm his earlier decision through proper procedures, he could not directly order refunds of the excessive amounts paid by stockyard customers in the past. However, such a decision would justify restitution to the customers of the amounts held by the clerk of the District Court. Similarly, we have found an order of the Commission invalid on the basis of a procedural defect (untimeliness). But in order to advance the Federal Power Act's policy of maintaining just and reasonable rates, we have provided that refunds to the filing utility's customers will be apropriate if the Commission subsequently makes definite its earlier finding that I&M's filed rates may be unlawful by so holding in a final decision.

Finally, we are not "intruding upon the administrative province" by our actions herein. Our denial to I&M of retroactive relief for the period 14 July 1972 through 13 December 1972 is not an infringement upon the Commission's exclusive suspension power.[20] The Commission ex-

19. *Id.* at 189-90.

20. As recognized by this court in *Pennsylvania Gas & Water Co.* v. *FPC*, 150 U.S. App. D.C. 151, 463 F.2d 1242 (1972) (Natural Gas Act §4(e), 15 U.S.C. §717c(e) (1970)).

We may distinguish the instant case from *United States* v. *SCRAP*, 412 U.S. 669 (1973), and *Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963), which interpreted the suspension provision of the Interstate Commerce Act, §15(7), 49 U.S.C. §15(7) (1970). In *Arrow*, the Supreme Court held that the District Court had infringed upon the exclusive suspension power of the Interstate Commerce Commission when it enjoined implementation of a filed rate schedule after the statutory seven-month suspension period had

plicitly determined that suspension was appropriate but failed to issue its suspension order in a timely fashion. Nor are we interfering with the Commission's statutory role as the sole body responsible for determining whether an electric utility's filed rates are just and reasonable. We have not relieved I&M's customers of the burden of paying I&M's filed rates. We have merely provided that if the Commission subsequently determines that the filed rates are unjust or unreasonable, it may order I&M to refund the excess amounts paid by its customers.[21] Thus, we are convinced that our exercise of equity powers here promotes the policy of the Federal Power Act without violating the terms of the Act or infringing upon the exclusive domain of the agency charged with implementing the Act.

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expired. The Court endorsed the following statement by the Fifth Circuit, which had reversed the District Court's decree:

> Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power.

372 U.S. at 662, *quoting* 308 F.2d 181, 186 (1962). In *SCRAP* the District Court enjoined collection of railroad freight surcharges despite the fact that the ICC had denied requests to suspend the surcharges for the statutory seven-month period under section 15(7). The Supreme Court reversed, noting that the District Court's "injunction constitutes a direct interference with the Commission's discretionary decision whether or not to suspend the rates." 412 U.S. at 692. In the case at bar, our denial of retroactive increases to I&M for the five-month period from 14 July 1972 through 13 December 1972 does not extend the statutory five-month suspension period as was the case in *Arrow*. Moreover, our order does not interfere with the Commission's "discretionary decision whether or not to suspend"; rather, it gives effect to the Commission's decision that suspension was appropriate.

21. *Cf. United States* v. *Morgan*, 307 U.S. 183, 198 (1939); *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212, 231 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

Our decision draws support from *Mississippi River Fuel Corp.* v. *FPC*,[22] in which the Third Circuit held that the Commission had acted outside its authority by summarily rejecting the filing utility's rate schedule without a hearing. This rejection, the court found, violated the procedural requirements of sections 4 and 5 of the Natural Gas Act,[23] which are virtually identical to sections 205 and 206 of the Federal Power Act. The court ordered that the filed rates be given immediate effect, but "subject to the right of the Commission forthwith to direct and give notice of a hearing upon the new schedules and to safeguard customers of petitioner in the payment of the new tariffs pending the outcome of such hearing by requiring petitioner to file such bond as is contemplated and authorized by section 4(e)." The court thus permitted the Commission to proceed with hearings on the justness and reasonableness of the proposed rates under section 4(e) (the counterpart in the Natural Gas Act to section 205(e) of the Federal Power Act), *with full authority to order refunds,* despite the fact that the technical effective date of the filing utility's new rates had long since passed.[24]

The filing utility subsequently moved to modify the court's order by making its rate filing effective retroactively to 1 June 1952, or 31 days after the date of filing. The court denied the motion, thus in effect imposing a *de facto* suspension of several months on the filed

22. 202 F.2d 899 (3d Cir.), *cert. dismissed,* 345 U.S. 988 (1953).

23. 15 U.S.C. §§717c & 717d (1970).

24. The rates were filed on 30 April 1952, with a proposed effective date of 1 June 1952. The court issued its main opinion on 9 February 1953.

rates. The court justified its decision by reasoning that granting the retroactive relief requested (1) would force the filing utility's principal customer "to pay additional retroactive charges of about $3,000,000 *for gas it already has resold to its own customers on the basis of* [*the filing utility's*] *existing rate to it*" [25] and (2) would fly in the face of "an affirmative though legally misconceived rejection of [the] proposed rate increase by the administrative body which had jurisdiction over the subject matter." [26] In the instant case, we have justified our modified relief herein in part on the basis that (1) granting I&M fully retroactive relief would impose substantial, irrecoverable costs on I&M's customers,[27] and (2) the Commission has affirmatively found that I&M's rates may be unjust or unreasonable, although it implemented its finding in a procedurally defective manner.[28] Therefore, we believe our exercise of equity powers can rest on the authority of *Mississippi River Fuel* as well as *United States* v. *Morgan.*

III. *Conclusion*

For the reasons stated herein, we grant the petitions for rehearing and modify our main opinion of 14 February 1974 in the manner set out in the third paragraph of this opinion.

So ordered.

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25. 202 F.2d at 904 (emphasis supplied).

26. *Ibid.*

27. Notes 2-5 *supra* and accompanying text.

28. Text accompanying note 10 *supra. See United States* v. *Morgan,* discussed in text accompanying notes 15-19 *supra; Atlanta Coast RR. Co.* v. *Florida,* 295 U.S. 301, 311-12 (1935).

Judgment of the Court of Appeals Dated February 14, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2168 September Term, 1973

Indiana & Michigan Electric Company,
Petitioner,

v.

Federal Power Commission,
Respondent.

Richmond Power and Light of the City of Richmond, Indiana, Indiana & Michigan Municipal Distributors Asso., Anderson Power and Light of the City of Anderson, Indiana,
Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Chief Judge, Robinson and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of this Court filed in the above captioned case on June 19,

1973, dismissing the petition for Review as moot, is vacated, and it is

FURTHER ORDERED AND ADJUDGED by this Court that the orders of the Federal Power Commission here in issue are vacated and this case is remanded for implementation of the opinion filed herein this date.

Per Curiam
For the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Date:
Opinion for the Court filed by Circuit Judge Wilkey

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 14 1974

HUGH E. KLINE
Clerk

Opinion of the Court of Appeals Dated February 14, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2168

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

RICHMOND POWER & LIGHT OF THE CITY OF RICHMOND, INDIANA
INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSO.
ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA, *Intervenors*

Petition for Review of an Order of the Federal Power Commission

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Decided 14 February 1974

Before: BAZELON, *Chief Judge*, ROBINSON and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* Indiana & Michigan Electric Company (hereinafter I&M) filed proposed changes in its tariff schedule with the Federal Power Commission

on 13 June 1972. By letter of 3 July 1972, the Secretary of the Commission acknowledged I&M's filing and advised the company that "[t]he earliest effective date for the increase consistent with [Section 35.13(b)(4)(i)] of the Regulations would be August 13, 1972."[1] This section of the Commission's regulations[2] requires that, whenever

1. Joint App. at 162.

2. 18 C.F.R. §35.13(b) (4) (i) (1973):

> Except as provided in subdivision (ii) of this subparagraph, if the rate schedule provides for an increased rate, then 60 days prior to the date that such changed rate is proposed to become effective the filing public utility shall submit a statement showing its cost of the service to be supplied under the new rate schedule according to supporting statements A through O as described below. Simultaneously, the public utility shall submit the material on sales and revenues described in paragraph (a) of this section and, unless the rate schedule containing the proposed increased rate is likewise simultaneously filed, a summary statement of such proposed increased rate: *Provided, however,* That the submittal of such summary statement of the rate schedule shall not be in lieu of the rate schedule as required to be filed with the Commission pursuant to the regulations in this part.

Supporting statements A through O specify filing of the following data: balance sheet, income statements, earned surplus statement, cost of plant, accumulated depreciation, average working capital, rate of return, debt capital, operating expenses, depreciation expense, income taxes, other taxes, overall cost of service, allocated cost of service, comparison of cost of service, and "fuel adjustment factor."

In addition, 18 C.F.R. §35.13(b)(5) (1973) provides:

> A utility filing for an increase in rates and charges shall be prepared to go forward at a hearing on reasonable notice on the data which have been submitted and sustain the burden of proof, imposed by the Federal Power Act, of establishing that its proposed charges are just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act. The Commission is desirous of avoiding delay in processing rate filings. To this end, if the rate schedule provides for an increase in rate which exceeds $30,000 in revenues for the test period, the filing utility shall submit with its rate increase filing 60 days prior to the proposed effective date of such increased rates,

a filing calls for a rate increase, certain cost-of-service data and a summary of the proposed rates be filed 60 days prior to the date the rates are to take effect. On 18 July 1972 I&M applied to the Commission for an order making its new rate schedule effective as of 14 July, or 31 days after the date on which I&M had previously filed. On 11 August 1972 the Commission accepted I&M's rates for filing but designated 13 August as their effective date; it then suspended their use for five months thereafter, or until 13 January 1973.[3] By order dated 6 October 1972 the Commission denied I&M's application for rehearing.[4]

I&M's petition for review of the Commission's order was originally consolidated with petitions by two of I&M's customers, Richmond Power and Light and Anderson Power and Light. On 25 May 1973 this court held that I&M's rate filing was unlawful with respect to Richmond and Anderson because it violated the terms of their contracts with I&M.[5] However, since the parties here have represented to the

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testimony and exhibits of such composition, scope and format that they would serve as the company's case-in-chief in the event the matter is set for hearing. In addition to whatever material the utility chooses to submit as part of its case, except for increases resulting from changes made in fuel clauses and increases of rates comprising an integral part of coordination and interchange arrangements in the nature of power pooling transactions, the exhibits shall include full cost of service data, as identified in subparagraph (4)(iv) of this paragraph, statements A through O, and the accompanying testimony should include an explanation of these exhibits.

3. *Indiana & Michigan Electric Co.*, F.P.C. Docket No. E-7740, Joint App. at 158.

4. Joint App. at 196. Commissioner Moody filed a dissenting view.

5. *Richmond Power & Light* v. *FPC*, No. 72-1963 and *Anderson Power & Light* v. *FPC*, No. 72-2035, *cert. denied*, No. 73-511 (3 Dec. 1973).

court that I&M's contract with at least one of its other 22 customers[6] is different from the Richmond and Anderson contracts, I&M's petition to have the effective date of its new rate schedule retroactively altered to 14 July 1972 remains viable.[7]

Because the Commission lacked statutory authority to delay the effective date of I&M's filing until 13 August 1972 and to suspend the new rates until 13 January 1973, we vacate the Commission's order of 11 August 1972 and remand to the Commission with instructions that I&M's 13 June rate filing be given effect as of 14 July 1972.[8]

I. Jurisdiction of the Court to Consider the Validity of the Commission's 60-Day Regulation

The liminal question here is whether this court can, consistent with section 313(b) of the Federal Power Act, consider I&M's contention that the Commission's 60-day prefiling regulation is invalid. Section 313(b) provides, in relevant part: "No objection to the order of the Com-

6. Thirteen of these customers are affiliated in the Indiana and Michigan Municipal Distributors Association, an intervenor in this case. Eight others are rural electric cooperatives.

7. Counsel for I&M informed the court at oral argument that the city of Auburn, Indiana has the same contract with I&M as Richmond and Anderson. Therefore, the Commission has declared I&M's filing ineffective as to Auburn. The court will not in the context of this case attempt to determine to which of I&M's customers the new rate schedule can lawfully apply. We leave such determinations to the Commission, whose orders can then be brought to this court by aggrieved parties through normal review procedures.

8. This will involve collection by I&M from its customers of the difference between the increased rates and the rates actually charged for the six-month period from 14 July 1972 to 13 January 1973. There is precedent in this circuit for ordering retroactive rate adjustments. *See Tennessee Valley Municipal Gas Ass'n* v. *FPC,* 152 U.S. App. D.C. 298, 470 F.2d 446 (1972), a case that arose under the Natural Gas Act, 15 U.S.C. §§717 *et seq.* (1970).

mission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.'"[9]

While I&M did not expressly raise the legality of the 60-day regulation in its application for rehearing, it did challenge the Commission's statutory authority to set an effective date 60 days after I&M's filing.[10] The Commission characterized I&M's position in seeking a rehearing as follows: "I&M asserts that the Commission has no authority to require a notice in excess of the thirty days specified in Section 205(d) of the Federal Power Act."[11] Apparently perceiving I&M's position as a challenge to the 60-day regulation, the Commission devoted two of the five pages of its order denying rehearing to an attempted justification of the regulation.[12] Commissioner Moody joined issue with the majority and attacked the validity of the regulation in his dissent.[13] Clearly, then, I&M brought sufficient attention to the issue to stimulate the Commission's consideration of it.

The rationale of the requirement that an aggrieved party exhaust its administrative remedies, as provided by section 313 of the Federal Power Act, is " 'that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it

9. 16 U.S.C. §825*l*(b) (1970).

10. Joint App. at 169.

11. Joint App. at 198.

12. Joint App. at 198-99.

13. Joint App. at 203.

has an opportunity for correction . . . .' "[14] I&M gave the Commission an opportunity to correct its alleged error in setting the effective date of I&M's rates. Furthermore, I&M suggested the possibility that the 60-day regulation is invalid by inviting the Commission to construe the regulation in a manner "compatible with the Commission's statutory authority."[15] The Commission declined to correct its alleged error and explicitly defended the validity of its regulation. Thus, I&M should be permitted to assert the regulation's invalidity in this court.

II. The Commission's 60-Day Prefiling Regulation

The Commission delayed the effective date of I&M's rate filing pursuant to section 35.13(b)(4)(i) of its regulations.[16] This section requires that if a proposed rate schedule calls for increased rates, the utility must file with the Commission "a statement showing its cost of the service to be supplied under the new rate schedule," "a summary statement of [the] proposed increased rate," and certain material on sales and revenue under the old rates and the proposed rates, all "60 days prior to the date that such changed rate is proposed to become effective."[17] Much of the data required presupposes the existence of a completed rate schedule. Obviously, a "summary statement of [the] proposed increased rate" cannot be filed unless the thing

14. *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955), *quoting United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

15. Application for Rehearing of Indiana & Michigan Electric Co., F.P.C. Docket No. E-7740, Joint App. at 174.

16. 18 C.F.R. §35.13(b)(4)(i) (1973), set out in note 2 *supra*.

17. *Ibid.*

to be summarized, the rate schedule itself, has been prepared. Included in the cost-of-service items required are "the percentage rate of return claimed,"[18] "the maximum demands of the service under the proposed rate schedules,"[19] and "revenues under the proposed rates."[20] Accurate calculation of these items would be difficult, if not impossible, in the absence of a detailed schedule of the proposed rates. Similarly, a detailed schedule is a prerequisite to calculation of "[a] statement comparing sales and services and revenues therefrom . . . under both the rate schedule proposed to be superseded or supplemented and the proposed changed rate schedule."[21] Finally, section 35.13(b)(5) further requires that "the filing utility shall submit with its rate increase filing 60 days prior to the proposed effective date of such increased rates, testimony and exhibits of such composition, scope and format that they would serve as the company's case-in-chief in the event the matter is set for hearing."[22] Again, preparation of such information depends upon the existence of the completed rate schedule.

It seems clear, then, that in order to comply with the requirements of section 35.13(b), a utility must be prepared to make a complete filing of its new rate schedule. Thus, the practical effect of the section is to impose a *de facto*

18. *Ibid.* (Statement G).

19. *Ibid.* (Statement M (3)).

20. *Ibid.* (Statement N).

21. 18 C.F.R. §35.13(b)(1) (1973). Section 35.13(b)(4)(i) refers to filing of "material on the sales and revenues described in paragraph (a) of this section." The reference to paragraph (a) is apparently an error since paragraph (a) says nothing about material on sales and revenue.

22. 18 C.F.R. §35.13(b)(5) (1973), set out in full in note 2 *supra*.

60-day notice requirement on utilities seeking to increase their rates. Such a requirement contravenes the terms of section 205(d) of the Federal Power Act, which provides:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.[23]

The Supreme Court has interpreted this language to create not only a *minimum notice period* for the utility's customers and the Commission, but also a *maximum waiting period for the filing utility.* In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*,[24] the Court construed section 4(d) of the Natural Gas Act,[25] whose language is virtually identical to that in section 205(d) of the Federal Power Act, as providing for "the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."[26] Thirty days is the maximum a utility can be

23. 16 U.S.C.§824d(d) (1970).

24. 358 U.S. 103 (1958).

25. 15 U.S.C. §717c(d) (1970).

26. 358 U.S. at 114.

compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power. Under the Commission's regulations, a utility must make a *de facto* rate filing 60 days in advance of the effective date. Therefore, the regulations unlawfully extend the statutory waiting period for utilities by 30 days.

The Commission asserts that the 60-day prefiling requirement of section 35.13(b)(4)(i) is necessary to "the proper exercise of its ratemaking authority under the Federal Power Act."[27] To exercise its authority properly, the Commission must evaluate in each case the advisability of suspending the rate filing pending full hearings on the reasonableness of the proposed rates. The Commission argues that "[t]he difficulty of such evaluations often requires more time than the 30 days to which I&M would restrict the Commission."[28] This statement fixes responsibility for the 30-day "restriction" with the wrong party, for it is Congress that specified 30 days from the filing date as providing for "the earliest effectuation of contractually authorized or otherwise permissible rate changes *consistent with appropriate Commission review.*"[29] If the Commission cannot properly exercise its ratemaking authority within the 30-day time frame prescribed by section 205(d), it should address its grievance to Congress, not to the judiciary.

The result we reach here is not foreclosed by this court's decision in *Municipal Light Boards* v. *FPC*.[30] As

27. Brief for Respondent at 25.

28. *Id.* at 26.

29. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958) (emphasis supplied).

30. 146 U.S.App.D.C. 294, 450 F.2d 1341 (1971).

Commissioner Moody pointed out in his dissent to the Commission's denial of I&M's application for rehearing, the validity of section 35.13(b) of the Commission's regulations was not really in question in *Municipal Light Boards*.[31] The parties in that case merely assumed the provision's validity and contested the issue of whether the Commission could *waive* its own regulation by permitting a *less-than-60-day* waiting period. Consequently, we properly expressed no view on a possible issue never raised by any party, *i.e.*, whether promulgation of the regulation was within the Commission's statutory authority.

Under section 205(d) of the Federal Power Act, I&M was entitled to an effective date of 14 July 1972 for the rate schedule it filed on 13 June. The Commission therefore acted unlawfully by delaying the effective date until 13 August.[32]

III. The Five-Month Suspension of I&M's Rates

Section 205(e) of the Federal Power Act empowers the Commission to hold hearings on the lawfullness of a

31. Joint App. at 203.

32. The Commission's staff reached this conclusion in a letter to the Commission captioned "Commission Staff Response to Application of Indiana & Michigan Electric Company" and dated 28 July 1972. The letter stated:

> In I & M's case, if five months' suspension is ordered and the 60-day rule is invoked, the proposed rates would not go into effect until six months after the proposed effective date. If the rate changes are accepted for filing without suspension, the effective date would be 60 days after the proposed effective date. It may be observed further that the Commission's Regulations Under the Natural Gas Act do not prescribe a 60-day filing requirement and that the same threshold decision as to whether to order an investigation and hearing, or a suspension, or both, must be made. Since both Section 4(d) of the Natural Gas Act and Section 205(d) of the Federal Power Act require only 30 days' notice of rate changes, the staff respectfully submits that it would be inappropriate to require more of I & M.

Joint App. at 87.

proposed rate schedule and, pending such hearings, to suspend use of the schedule for no longer than five months "beyond the time when it would otherwise go into effect." [33] The Commission recognized in its order denying rehearing that it "does not have statutory authority to issue a suspension order after a proper proposed effective date." [34] Commissioner Moody seconded this observation in his dissent:

> Once proposed rates have become effective this Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under § 205 of the Federal Power Act. Our only recourse is to in-

33. 16 U.S.C. §824d(e) (1970).

34. Joint App. at 200. A similar recognition occurred in *Central Maine Power Co.*, F.P.C. Docket Nos. E-7824 and E-8038 (8 June 1973), in which the Commission stated:

> With respect to the request for suspension of Central Maine's proposed amendment and for refund protection thereunder, we find that the proposed amendment became effective by operation of law on March 16, 1973, thirty days after filing and prior to the issuance of the Commission's order on April 10, 1973. We are without authority under the Federal Power Act to rescind or suspend the effectiveness of the proposed amendment.

See also Phillips Petroleum Co. v. *FPC*, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

It is to be observed that I&M's application of 18 July 1972, asking for a Commission order making the new rate schedule effective retroactively as of 14 July, would possibly have permitted the Commission to issue a suspension order for five months from the valid effective date of 14 July 1972. At least, it is clear that I&M would not have been in a position to challenge such an order as it has now, and that I&M was not seeking a procedural gimmick which would have resulted, as now has occurred, in voiding the Commission's five-month suspension order. However, we do not reach the question suggested by this discussion since the Commission has never asserted that I&M's 18 July application for a 14 July effective date gave the Commission jurisdiction to suspend I&M's rates retroactively from 14 July; rather, the Commission has been consistent in contending that 13 August was the effective date and that the 11 August suspension was therefore valid.

stitute a proceeding under § 206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force."[35]

Since we hold that the lawful effective date of I&M's rate filing was 14 July 1972, the Commission had no authority to suspend use of the new rate schedule on 11 August 1972. Therefore, the Commission's suspension order of that date must be vacated.

IV. Conclusion

The Commission has exceeded its statutory authority by delaying the effective date of I&M's rate filings beyond the 30 days prescribed by section 205(d) of the Federal Power Act. Therefore, we order that the effective date of I&M's filing be changed retroactively to 14 July 1972. It inevitably follows that the Commission's 11 August suspension order was *ultra vires* and must be invalidated. The orders here in issue are vacated and the case is remanded for implementation of this opinion.

Vacated and Remanded.

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35. Joint App. at 202. Section 206(a) of the Act, 16 U.S.C. §824e(a) (1970), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

Order of the Commission Dated August 11, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., and PINKNEY WALKER.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740

Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date

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(Issued August 11, 1972)

Indiana & Michigan Electric Company (I & M) on June 13, 1972, tendered for filing the following tariff changes,[1] each of which was proposed to become effective on July 14, 1972:

(1) First revised sheets No. 7 to 11-3 to the Company's FPC Electric Tariff MRS, under which twelve municipal customers are being served;

(2) Supplements to four rate schedules under which four municipal customers are being served;

(3) Supplements to eight rate schedules under which seven rural electric cooperative customers are being served; and

(4) New FPC Electric Tariff WS, Original Volume No. 1, of the Company.

1. See designations in the appendix to this order.

The proposed changes would increase I & M's revenues from jurisdictional sales and service by approximately $6,180,000 anually based on the 12-month period ending December 31, 1971, as adjusted. I&M stated that the rate increase is necessitated primarily by the fact that at March 31, 1972, I & M's earnings were insufficient to permit the company to issue any additional long term debt to finance its construction program.

Notice of I & M's proposed changes was issued on June 23, 1972, and was published on June 30, 1972, 37 F.R. 12998. The notice required protests and petitions to intervene to be filed by July 5, 1972. By notice issued July 3, 1972, the date was extended until July 15, 1972, upon the request of Indiana Municipal Electric Association.

A protest against I & M's proposed changes was filed on June 28, 1972, by Coalition for the Environment, Inc., Fort Wayne, Indiana. A letter on behalf of the City of Bluffton, Indiana, in opposition to the proposed rate increase was also received. A letter in protest was received from the Honorable Birch Bayh, United States Senate, on August 7, 1972. Protests and petitions to intervene were filed by the City of Fort Wayne, Indiana, and by the City of Anderson, Indiana,[2] on July 3, 1972, and by a group of municipally-owned electric distributor customers[3] of I & M together

2. On August 2, 1972, the City of Anderson filed a document entitled "Supplemental Petition to Intervene, Formal Protest and Request for Rejection of Rate Schedules Submitted for Filing" alleging (1) that the proposed tariff changes are discriminatory, (2) that they are not permitted by the City's contract with I & M and should be rejected, and (3) that they should be suspended for five months and a hearing held.

3. Auburn, Indiana; Avilla, Indiana; Bluffton, Indiana; Columbia City, Indiana; Frankton, Indiana; Garrett, Indiana; Gas City, Indiana; Mishawaka, Indiana; New Carlisle, Indiana; Niles, Michigan; South Haven, Michigan; Sturgis, Michigan; Warren, Michigan.

with the Indiana and Michigan Municipal Distributors Association[4] on July 10, 1972.

Richmond Power and Light of the City of Richmond, Indiana (RP & L)[5] filed on July 3, 1972, a document entitled Protest, Motion to Reject, or, in the Alternative, Request for Hearing and Maximum Suspension Period. RP & L moves to reject I & M's filing on the grounds that it is discriminatory and is contrary to antitrust and other policies and that it violates contracts filed with and approved by the Public Service Commission of Indiana. RP & L also states that the proposed WS Tariff makes no provision for interchange of energy and that

> * * * the Commission pursuant to Section 202(b) of the Federal Power Act should order an interchange agreement between RP & L and I & M similar to that between Gainesville Utility Department and Florida Power Corporation (Protest, pp. 2-3).

RP & L further states that I & M is not permitted by contract to request an effective date prior to final approval of the proposed rate increase by the Public Service Commission of Indiana. In its alternative request, RP & L asks that I & M's proposed tariff changes be suspended for five months and that if a final order is not issued by the end of the five-month period, I & M be ordered to charge for electric service at no more than the rates prescribed by the

4. This is an *ad hoc* association of the group of 13 municipal customers and the Cities of Richmond, Indiana; Fort Wayne, Indiana; and Anderson, Indiana (Cities). This Association also filed on August 7, 1972, a Motion for Suspension of Proposed Rate Increase, alleging that regulations of the Price Commission require the maximum five months' suspension of I & M's proposed rate increase.

5. RP & L also filed on August 4, 1972, a telegram reiterating its position, and on August 7, 1972, a "Supplement to Motion to Reject Rate Schedule Filing."

company's IP Tariff, as approved by the Public Service Commission of Indiana. RP & L adds that Section 205(e) of the Federal Power Act requires suspension for five months unless a final order is issued sooner.

A group of rural electric cooperative customers[6] (Cooperatives) of I & M filed on July 17, 1972, a Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing. The Cooperatives ask that I & M's filing be rejected on the grounds that it is not permitted by I & M's contracts with them and that the amount of the increase to the Cooperatives exceeds any permissible amount under the economic stabilization program. The Cooperatives rely on *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956) and *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956) and on the following contract provisions to sustain their first ground:

Article 3B

> Customer agrees to take and pay for the electric capacity and energy delivered to Customer by Company hereunder in accordance with the provisions of Company's Tariff REMC as filed with the Public Service Commission of Indiana, a copy of which tariff is attached hereto as Exhibit A and is hereby made a part of this agreement.

Article 12

> Firm Agreement As to Rates And Charges: Should any change in the rate provided for in ARTICLE 3

6. Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

hereof be ordered by the Public Service Commission of Indiana, payment for services by Customer to Company as provided for in ARTICLE 3 hereof shall thereafter be made upon the basis of such new rate as changed and approved by the Public Service Commission of Indiana, provided, however, that in the event of such change in rate, either of the parties hereto shall have the right within a period of ninety days, beginning on the date when such change is ordered by the Public Service Commission of Indiana, to terminate this Agreement by giving to the other party at least sixty days prior notice in writing of its intention so to do.

Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or litigated by others than the parties hereto, including but not limited to Public Officials, Company will jointly and in cooperation wtih Customer defend the same before any regulatory body or court.

Article 13

After the expiration of said initial term, this Agreement will be renewed automatically for successive renewal periods of two (2) years thereafter, unless written notice of termination is given by either party to the other at least 36 months prior to the expiration of the initial term or any renewal period.

The Cooperatives protest the proposed rate increase on the grounds that it would produce an unreasonable rate of return to I & M and would have unfavorable consequences for the Cooperatives, including possible anticompetitive effects.

On July 18, 1972, I & M filed answers to the pleadings of the Cities. I & M does not oppose permitting them to intervene. I & M does oppose their requests for five-months'

suspension of the proposed tariff changes. I & M denies that any of the matters alleged in RP & L's pleading establish any basis for granting RP & L's request to reject the proposed rate schedules.

On August 2, 1972, I & M filed an answer to the Cooperatives' protest and petition. I & M opposes the Coperatives' petition for rejection of the proposed rate schedules on the ground that Article 12 of the contracts[7] shows that the parties expressly contemplated and provided for changes in rates. I & M states that the Cooperatives fail to allege any facts or contentions sufficient to warrant suspension of the proposed rates for the maximum period of five months. I & M does not oppose permitting the Cooperatives to intervene in this proceeding.

On July 18, 1972, I & M filed an application for an order fixing July 14, 1972, as the effective date of its proposed rate schedules. The application requests relief, in effect, from a July 3, 1972, letter of the Secretary of the Commission acknowledging I & M's filing and advising the company that:

> The earliest effective date for the increase consistent with [Section 35.13(b)(4)(i)] of the Regulations would be August 13, 1972.

Section 35.13(b)(4)(i) of the Commission's Regulations Under the Federal Power Act requires applicants for rate increases to submit certain data 60 days in advance of the

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7. I & M's answer also quotes the following from Section 6 of the "Other Terms and Conditions" portion of tariff REMC attached to the contracts:

> G. Service shall be furnished and taken under the Company's general rules and regulations on file with the Commission, except to the extent, if any, that the same are expressly modified by the terms and conditions hereinabove provided.

proposed effective date. I & M's tender was made 31 days prior to the proposed effective date of July 14, 1972. The application states that this 60-day filing requirement is unreasonable and unnecessary under the circumstances and that, in any event, it should be waived pursuant to Section 35.11 of the Regulations. The Commission staff responded on July 28, 1972, and suggested that the 60-day filing requirement may be improper because (1) both the Federal Power Act and the Natural Gas Act require only 30-days' notice of rate changes and (2) it operates in effect as an extension of the statutory provisions for five-months' suspension and 30-days' notice of rate changes (See Section 205(e) and 205(d) of the Federal Power Act, respectively). A response in opposition to I & M's applications was filed by the City of Anderson, Indiana, on August 1, 1972, and by RP & L on August 7, 1972.

On August 2, 1972, the Indiana and Michigan Municipal Distributors Association filed a Response to Application for Fixing of Effective Date of Increase. This pleading prays that August 14, 1972, be regarded as the proposed effective date of I & M's tariff changes and that they be suspended for five months. The Association also asks that a phased proceeding be instituted, with the first phase directed to I & M's adjustment to fuel and power costs and the second phase directed to all other issues. This request will be denied because the issues involved in this proceeding are not clearly separable and because phasing this proceeding would impede the most expeditious disposition of it.

The Cooperatives, RP & L, and the City of Anderson, Indiana, have requested that the rate schedules filed by I & M applicable to them be rejected on the ground that the rate changes proposed by I & M are not permitted by

their contracts. This Commission does have authority to reject tariff changes which are not permitted by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956). The contract provisions cited by the Cooperatives and I & M indicate that, at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction and that rate changes were contemplated by the order or with the approval of that Commission. This Commission's jurisdiction over I & M's wholesale rates has since been asserted and confirmed, *Indiana & Michigan Electric Company*, 33 FPC 739 (1965), affirmed, 365 F.2d 180 (CA 7, 1966), cert. denied, 385 US 972 (1966). For the reasons discussed in *Public Service Company of Indiana, Inc.*, Docket No. E-7645 (orders issued February 25, 1972, and May 25, 1972), petition for review filed, *Indiana Statewide Rural Cooperative, Inc.*, v. *FPC*, CADC No. 72-1696, involving similar facts, we find that I & M's contracts with the Cooperatives are not fixed-rate contracts and that I & M's changes applicable to the Cooperatives should not be rejected as contractually barred, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 US 103 (1958).

RP & L's request that I & M's tariff changes applicable to it be rejected will also be denied. The approval of the Public Service Commission of Indiana is not a prerequisite to the tendered tariff changes by I & M because that Commission does not have jurisdiction. None of RP & L's other allegations are cause for rejection.

The City of Anderson requests rejection of I & M's Rate Schedule WS on the ground that Anderson's 1957 contract

with I & M provides for Anderson to be served under Tariff IP as long as Tariff IP is in effect and that Anderson has not agreed to take service under any other schedule. I & M's Tariff IP is applicable to I & M's industrial customers and is therefore on file with the Public Service Commission of Indiana. Tariff IP is also applicable to Anderson, RP & L, and other customers taking service subject to this Commission's jurisdiction and is therefore on file as a contract with this Commission. Neither Anderson nor RP & L alleges that a fixed-rate contract exists. We find that I & M is not precluded from filing the changes in rates, terms and conditions of service as embodied in Rate Schedule WS.

In justifying a proposed effective date 31 days after filing, I & M alleges that increased revenues are necessary to improve its interest coverage and to permit the issuance of long-term debt. We find that good cause has not been shown for waiver of the 60-day filing requirement of the Regulations. The proposed rates and charges, furthermore, have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. It has also been alleged that I & M's proposed tariff changes are contrary to the economic stabilization program and antitrust policies and that interchange of energy should be provided for. It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in I & M's proposed FPC Electric Tariff, and the use thereof deferred as hereinafter provided. I & M's proposed tariff changes will be sus-

pended for five months beginning August 13, 1972, and will become effective subject to refund on January 13, 1973.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held concerning the lawfullness of the rates, charges, classifications, services, and other provisions contained in Indiana & Michigan Electric Company's proposed FPC Electric Tariff and shall commence with a prehearing conference to be held on November 23, 1972.

(B) I & M's application and request for waiver are denied.

(C) Pending such hearing and decision thereon, I & M's proposed tariff sheets are accepted for filing and are suspended and their use deferred until January 13, 1973.

(D) All motions and petitions to reject I & M's filing are denied.

(E) The request of Indiana and Michigan Municipal Distributors Association for phased proceedings is denied.

(F) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in their respective petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any

of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(G) The Chief Examiner or any other designated by him for that purpose (See Delegation of Authority, 18 CFR 3.5(d)) shall preside at the hearing in these proceedings and shall prescribe relevant procedural matters not herein provided.

(H) At the prehearing conference the direct evidence of I & M and the Commission staff shall be copied into the transcript, subject to appropriate motions, if any, by the parties to the proceeding, and procedures adopted for an orderly and expeditious hearing. On or before November 14, 1972, the Commission staff shall serve its prepared testimony and exhibits, if any. The prepared testimony and exhibits, if any, of intervenors shall be served on or before December 1, 1972. Rebuttal evidence, if any, of I & M shall be served on or before December 15, 1972. Cross-examination of the evidence filed shall commence at 10:00 A.M. on January 2, 1973, in a hearing room of the Federal Power Commission.

By the Commission.

(SEAL)

MARY B. KIDD,
Acting Secretary.

APPENDIX

Indiana & Michigan Electric Company
Rate Schedule Designations

Filing Date: June 13, 1972
Date of Instruments: June 13, 1972

[Balance of Appendix omitted as not relevant.]

Order of the Commission Dated October 6, 1972

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

INDIANA & MICHIGAN ELECTRIC COMPANY

Docket No. E-7740

Order Denying Rehearing, Request for Oral Argument, Request for Rejection of Rate Filing, and Motion to Reject Supplementary Pleading

---

(Issued October 6, 1972)

On August 11, 1972, our "Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date" was issued in this proceeding. Applications for rehearing were filed by the City of Anderson, Indiana (Anderson) on September 8, 1972, and by Indiana & Michigan Electric Company (I&M), Richmond Power and Light of the City of Richmond, Indiana (RP&L) and a group [1] of cooperative customers (Cooperatives) of I&M on September 11, 1972.

1. Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

Anderson and RP&L urge that I&M's filing applicable to them should be rejected on the ground that I&M is obligated to serve them under Tariff I.P. as long as it is in effect. Anderson relies on the following contract language, which is nearly identical to that relied on by RP&L:

> The customer hereby agrees to pay the Company monthly for electric energy delivered heerunder at the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. * * * as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective.

Rate Schedule WS containing increased rates was tendered to supersede Tariff I.P. in I&M's rate schedules applicable to service to Anderson and RP&L. RP&L argues further that this contract language represents agreement by I&M that its wholesale rates to RP&L would be the same as I&M's retail rates in its Tariff I.P. on file with the Indiana Public Service Commission.

This Commission has exclusive jurisdiction over I&M's wholesale sales to Anderson and RP&L, and I&M is obligated to charge those rates which are on file with this Commission. This Commission's jurisdiction cannot be limited or avoided by private contract. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corporation*, 379 U.S. 687 (1965); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (CA3, 1956), cert. denied, 352 U.S. 971 (1957). For service subject to this Commission's jurisdic-

tion, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission.

R P & L also repeats its argument that I & M's filing should be rejected because I & M did not give 90 days' written notice and meet with R P & L to discuss the proposed changes as required by their contract. This ground does not justify rejection because it does not render I & M's filing either "* * * deficient in form or a substantive nullity," *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *FPC*, 450 F.2d 1341, 1345 (CADC 1971), cert. denied, 405 U.S. 989 (1972). The applications of Anderson and R P & L for rehearing will be denied.

The Cooperatives request rehearing with oral argument and rejection of the proposed rate schedules applicable to them. Their application for rehearing repeats the arguments for rejection which were fully considered in our August 11 order and attacks our orders in *Public Service Company of Indiana, Inc.*, Docket No. E-7645, appeal pending, *Indiana Statewide Rural Electric Cooperative, Inc.* v. *FPC*, CADC No. 72-1696. The Cooperatives imply that denial of their motion for rejection was based solely on the previous orders in Docket No. E-7645. On the contrary, we ruled on the merits of the Cooperatives' contentions in this proceeding and merely referred to the rationale of the previous orders. The Cooperatives dwell nevertheless on Docket No. E-7645 and draw a distinction between that case and this one on the basis of the following language from Article 12 of their contracts:

> Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or

> litigated by *others than the parties hereto,* including but not limited to Public Officials, Company will jointly and in cooperation with Customer defend the same before any regulatory body or court. (emphasis added)

Since I & M is a party to the contracts, this language obviously does not have the effect of precluding I & M from proposing rate changes. The Cooperatives' application and, since the Cooperatives' arguments have been adequately briefed and fully considered, their request for oral argument will be denied.

I & M asserts that the Commission has no authority to require a notice in excess of the thirty days specified in Section 205(d) of the Federal Power Act. By Section 35.13(b)(4)(i) of its Regulations issued under Section 309 of the Federal Power Act, the Commission requires the filing of cost of service data 60 days prior to the proposed effective date of increased rates. The rate schedule setting forth the increased rates need only be filed 30 days prior to the proposed effective date. Section 35.2, 35.3 and 35.13 (a), Regulations under the Federal Power Act.

As set forth in *Municipal Light Boards* v. *FPC, supra* at 1354, the 60 day regulation is reasonable and is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both."

Moreover, I&M's reading of Section 205(d) of the Federal Power Act gives the same meaning to two separate sentences of that section, by asserting that both provisions permit the Commission only to fix a shorter notice period. Section 205(d) reads as follows:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates,

> charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

In order to give meaning to all parts of the Section, since the last sentence gives the Commission power to permit less than 30 days notice, the provision in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to require the filing of requisite data more than 30 days prior to the proposed effective date.

If the Commission has authority to require filing of certain data 60 days prior to the proposed effective date, a suspension of the increased rates for five months thereafter is obviously consistent with Section 205(e) of the Federal Power Act.

In arguing that no regulatory or administrative consideration justifies denial of its request, I&M proposes that rate increase filings be permitted 30 days before the proposed effective date and that any suspension order be issued up to 60 days after the filing date with the suspension period running from the proposed effective date. This proposal is unworkable because the Commission does not have statutory authority to issue a suspension order after

a proper proposed effective date. I&M's proposed effective date of July 14, 1972, was improper because it was not 60 days after the filing date of June 13, 1972, and adequate review of I&M's filing by the staff necessitated the full 60-day period.

On September 25, 1972, a "Supplement to Petition of the City of Fort Wayne, Indiana, For Leave to Intervene" was filed. This supplementary petition alleges that I&M is engaged in anti-competitive practices and violations of antitrust laws and specifically that I&M's proposed increased rates have these effects because I&M's retail rates in the vicinity of Fort Wayne are lower. Fort Wayne requests that I&M's filing applicable to it be rejected. On October 3, 1972, I&M filed a motion for the Commission to reject or refuse to permit Fort Wayne's supplementary petition. Fort Wayne's pleading is actually in the nature of a motion, and we find that it does not state good cause for rejection of I&M's rate filing. We will deny the relief requested by Fort Wayne and I&M's motion.

The Commission further finds:

The grounds for rehearing set forth in the foregoing applications for rehearing present no new facts or principles of law which were not considered in our order of August 11, 1972, or which having now been considered warrant any change or modification of that order.

The Commission orders:

(A) The applications for rehearing filed herein and request for oral argument are denied.

(B) I&M's motion to reject Fort Wayne's "Supplement to Petition for Leave to Intervene" is denied.

(C) Fort Wayne's request that I&M's rate increase filing be rejected is denied.

By the Commission. COMMISSIONER MOODY DISSENTING FILED A SEPARATE STATEMENT APPENDED HERETO.

(SEAL)

KENNETH F. PLUMB,
Secretary.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740
(Issued October 6, 1972)

MOODY, Commissioner, Dissenting:

On June 13, 1972, Indiana & Michigan Electric Company (I & M) filed proposed rates increasing charges to its wholesale customers. I & M requested an effective date of July 14, 1972, and was advised by our Secretary that pursuant to the 60-day notice provision of Section 35.13(b)(4)(i) of the Regulations, the earliest possible effective date of the proposed rates was August 13, 1972. In response, I & M filed an application requesting either (i) an effective day of July 14, 1972, or (ii) that July 14, 1972, be set as the date from which any suspension of I & M's proposed rates would commence. On August 11, 1972, twenty-eight days after I & M's proposed effective date, the Commission issued an order suspending I & M's proposed rates for five months, with the suspension period commencing on August 13, 1972. In my opinion, that order when issued was, and continues to be, a nullity.

Once proposed rates have become effective this Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under §205 of the Federal Power Act. Our only recourse is to institute a proceeding under §206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force. For the reasons set forth below, I believe that:

(i) I & M's proposed rates became effective on July 13, 1972;

(ii) I & M in its application for rehearing provided us with the opportunity to avoid litigating this case while at the same time completely protecting the rights of its customers; and

(iii) The effect of the rejection of that opportunity by my colleagues will ultimately result in the sacrifice of customers' rights at customers' expense for the sake of what I conceive to be an illegal regulation.

My colleagues argue that the §35.13(b)(4)(i) of the Regulations is valid, that it has been reviewed and accepted with apparent approval in *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1354 (CADC 1971), cert. denied, 405 U.S. 989 (1972), and further that the interpretation placed by I & M upon §205(d) of the Act renders parts of the Act meaningless. I disagree on both counts.

In *Municipal Light Boards* v. *F.P.C.*, the issue presented to the court was whether the Commission could waive its regulations and permit rates to become effective on less than the required sixty-days notice. No party to the case took issue with the legality of the sixty-day rule, but rather assumed the validity of the rule and addressed their arguments to the question whether or not the question whether [*sic*] the Commission could validly waive its provisions. In this context, Judge Levanthal observed (at 1354) with respect to the sixty-day rule that it is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both." In my view, the quoted language from *Municipal Light Boards* is not authority for validity of the sixty-day regulation and uttered as it was in the context of an assumption of the

validity of the rule does not even rise to the dignity of dicta on the issue before us.

On the second point (for the sake of brevity I will not again reproduce the language of §205(d) of the Act), I agree with the conclusion of my colleagues that "the provisions in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to require the filing of requisite data more than 30 days prior to the proposed effective date." However, the reasoning by which one is forced from this conclusion to the companion conclusion (that I & M's construction of §205(d) of the Act gives the same meaning to two separate sentences of that section), is labored. The Commission may, under appropriate circumstances, require a notice period of more than thirty days. Two illustrations from our regulation of the interstate gas industry under identical provisions of the Natural Gas Act come to mind.

First, where there is a *quid pro quo* with the option left to the applicant to choose a 30-day notice period or a longer period with some added benefit to the applicant, there is no prohibition against the longer notice period. For example, our Regulations under the Natural Gas Act provide in pertinent part—

> §154.22 Notice requirement. All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof. . . .
>
> And §154.63(c) (4). . . . *Provided, however,* that if the proposed rate increase is filed at least 45 days before the effective date proposed therefor and such filing does not comply with the requirements of this

> section, the natural gas company will be notified of the deficiencies, and if such deficiencies are properly cured within 15 days from the date of such notice, the requisite supplementary material will be deemed to have been filed as of the same date as the initial submittal of the proposed rate increase.

Under this latter provision, the applicant may (and usually does) trade 15 days of additional notice for the opportunity to avoid rejection of its filing for noncompliance with our regulations.

A second illustration of where more than 30 days notice may be imposed is where there is no conflict with a suspension period. Where suspension, if any, and the requisite notice will not prevent the placing of proposed rates into effect for a combined period of not more than six months, the provisions of the Federal Power Act and the Natural Gas Act are satisfied. Although the legislative histories of both Acts are inconclusive on the issue, a report accompanying an amendment to the Natural Gas Act in 1961 read:

> The Commission, with respect to domestic users of natural gas, may suspend the effective date of a new rate filing up to a period of five months, which, together with the 30-day notice period, means a 6-month suspension.

Futhermore, of the analagous section in the Natural Gas Act, the Supreme Court has said:

> It may readily be seen that these requirements [§§4(c) and (d) of the Natural Gas Act]are no more than are necessary to implement §§4(e) and 5(a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days advance notice of changes

is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under §4(e).

It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. . . . This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry. . . . , and we think that it do [*sic*] so. . . . by providing in §4 for the earliest effectuation of contractually authorized or otherwise permissible rate review. . . . *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103,113-14 (1958).

The Court implied that the 30-day statutory period is to be used for the Commission review of rate filings and that a longer period would be incompatible with the filing utility's interest in the "earliest effectuation" of rate changes.

For the foregoing reasons, I dissent.

Rush Moody, Jr.,
Commissioner

Text of Statutes Relied On

Federal Power Act §205

Federal Power Act §205, 16 U.S.C. §824d:

"Section 824d. Rates and charges; schedules; suspension of new rates

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a

proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a)

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"Section 824e(a). Power of Commission to fix rates and charges; determination of cost of production or transmission

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any trans-

mission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Federal Power Act §313

Federal Power Act §313; 16 U.S.C. 825*l*:

"Section 825*l*. Rehearings; court review of orders

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such man-

ner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

DEC 11
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-571

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Respondents

Brief of Indiana & Michigan Municipal Distributors Association In Opposition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-571

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Respondents

Brief of Indiana & Michigan Municipal Distributors Association In Opposition

Comes now the Indiana & Michigan Municipal Distributors Association (IMMDA), an *ad hoc* association of municipally owned electric distributors which are customers of Petitioner Indiana & Michigan Electric Company (I&M) and are, as a group, intervenors and participants in the subject proceedings in the Federal Power Commission and the United States Court of Appeals for the District of Columbia Circuit (CADC), and files this Brief, pursuant to Rule 24 of the Rules of this Court, in opposition to the Petition for Certiorari filed by Indiana & Michigan Electric Company.

OPINIONS BELOW

The main opinion of the Court of Appeals and the order and opinion granting the petitions for rehearing and modifying the main opinion, neither of which is as yet reported, are reproduced in the Appendix, at 16a and 1a, respectively, of the Petition for Certiorari filed by Indiana & Michigan Electric Company.

QUESTIONS PRESENTED

1. Where an electric utility has petitioned for review of a Federal Power Commission order denying its requested relief, does the Court of Appeals exceed its authority by correcting an inadvertent procedural error of the Commission in such manner as to provide the utility with the exact relief it sought before the Commission?

2. Where the Federal Power Commission has, by virtue of an inadvertent procedural error, failed to observe a thirty-day statutory time limit upon issuance of an order suspending an electric rate increase filed under the Federal Power Act and providing for the collection subject to refund of any rates ultimately found to be excessive, does the Court of Appeals have authority to remedy the Commission's error by providing for suspension and refund of excessive rates?

STATUTES INVOLVED

The statute involved in this case is the Federal Power Act, Subchapter II, 16 U.S.C. § 824.

COUNTER STATEMENT OF THE CASE

These proceedings began with the filing by Indiana and Michigan Electric Company (I&M) of an electric rate increase under Section 205(d) of the Federal

Power Act (16 USC § 824 d (d)). The filing was made on June 13, 1972 and specified an effective date of July 14, 1972.

The Commission, through its Secretary, wrote to I&M on July 3, 1972, informing it that Section 35.13 (b) (4) (i) of the Commission's Regulations, required certain cost statements to be filed at least sixty days before the proposed rates were to become effective, and that the earliest effective date consistent with that Regulation was August 13, 1972.

On July 18, 1972, I&M moved for an effective date of July 14, 1972, instead of August 13.

The Commission denied that motion, and on August 11, 1972 issued an order setting August 13 as the effective date of the increase and suspending the new rates for the five-month period permitted by Section 205 (e) of the Act (16 USC § 824 d (e)), and providing for collection of the new rates after January 13, 1973, subject to refund. The Commission found:

> "The proposed rates and charges, furthermore, have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. * * * It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in I&M's proposed Federal Power Commission Electric Tariff and the use thereof deferred as hereinafter provided." (Pet. for Cert., App. p. 36a)

From this order delaying the effectiveness of its new rates by thirty days, I&M petitioned for rehearing, requesting specifically that the Commission:

> "Issue a supplemental order modifying paragraph (G) of its August 11, 1972 Order in this proceeding, so as to provide that I&M's proposed rate schedules are suspended for five months beginning July 14, 1972, and their use deferred until December 14, 1974." (Pet. for Cert. p. 7a)

This was the *only* relief requested by I&M except for such "other and further relief as to the Commission appears appropriate."

Upon denial of its application for rehearing, I&M petitioned for review to the United States Court of Appeals for the District of Columbia Circuit where, *for the first time*, it sought to have its new rates made effective without suspension, and without obligation for the refund of any portion thereof ultimately found to be excessive and unlawful.

The Court of Appeals held that Section 35.13 (b)(4)(i) of the Commission's Regulations was invalid, and the Commission had no power to require the filing of the data required thereby, prior to I&M's filing of its proposed new rate schedules; that I&M therefore had the right to an effective date of July 14, for its new rates; and that the Commission suspension and refund Order of August 11, 1972 was therefore out of time. The Court, therefore, held that, pursuant to Section 205 (d) and (e) of the Federal Power Act, 16 USC § 824 d(d) and (e), the new rates became effective, without suspension or refund obligation, on July 14, 1972.

The Court recognized that this was an anomalous result; that I&M had only sought an order changing the effective date of the new rate by thirty days, from August 13 to July 14 (in either event subject to the usual five-month suspension); and that

> "I&M was not seeking a procedural gimmick which would have resulted, as has now occurred, in voiding the Commission's five-month suspension order." (Pet. for Cert., App., p. 26a)

On petition for rehearing by the Commisson and customer groups, the Court considered the facts that

> "Under our main opinion, then, I&M's customers would be forced to pay possibly excessive rates from 13 January, 1973 until the conclusion of the Commission's ongoing hearings without prospect of receiving refund of the excessive amounts paid * * * *"

and that

> ". . . the Commission explicitly found in its 11 August, 1972 order that I&M's filed rates may be unjust or unreasonable ***"

and that

> "I&M sought from the Commission no greater relief than our modified order now grants * * *"

and that

> "By modifying our original order in the manner set out above, we eliminate the potential for hardship to I&M's customers and we accord I&M precisely the relief it sought from the Commission." (Pet. for Cert., App. p. 6a-7a)

The Court held that, under the principles set forth in the Court's opinions in *Ford Motor Company* v.

NLRB, 305 US 364 (1939) and *United States* v. *Morgan*, 307 US 183 (1939), it had the power to

> "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements." (305 US at 373)

Accordingly, the Court adjusted its relief to provide that I&M should not collect retroactive rate increases from the effective date of its filing, 14 July, 1972 through 13 December, 1972, but that it could collect such increases for the period 14 December, 1972 through 13 January, 1973 (thus granting to I&M the thirty-day change which it had originally requested of the Commission); and the Court stated that the rates collected after 13 December, 1972 would be subject to refund to the extent that they exceeded just and reasonable rates, as determined in the administrative proceedings.

The Court held that its action on the petition for rehearing was designed to advance the policies and procedural safeguards of Section 205 of the Act, and that it was not an infringement upon the Commission's exclusive suspension power, because the commission had explicitly determined that suspension was appropriate, but failed to issue its suspension order in a timely fashion. (App. to Pet. for Cert. 8a, 10a)

ARGUMENT

The action of the Court of Appeals on rehearing was well within the review powers of that Court, was amply supported by judicial precedent and was the only possible action consistent with the intent and purpose of the Federal Power Act.

I&M's Petition for Certiorari completely ignores the Administrative Procedure Act, which governs the scope of review by the Courts of Appeals of the actions of administrative agencies. (5 USC Sec. 701-706)

Section 705 of the APA specifically confers upon the reviewing court the power to:

> ". . . issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

This grant of power is to be exercised "to the extent necessary to prevent irreparable injury" (id.). Furthermore, under Section 703 of the Act, where the special statutory review proceeding is inadequate there is provision for "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus . . ." (5 USC Section 703). These provisions of the Administrative Procedure Act make clear beyond question the equitable powers of the court of appeals in a proceeding for review of the action of an administrative agency.

A large portion of petitioner's Brief herein consists in its attempt to distinguish this case from *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364 (1939), on the ground that the reviewing court in that case was exercising equity powers under the review provisions of the National Labor Relations Act which it does not have under the Federal Power Act.

This whole argument becomes irrelevant when the provisions of the Administrative Procedure Act are examined. The above quoted provisions of that Act clearly contemplate the exercise of equitable powers by courts which are engaged in the review of administrative agencies. Therefore, if the review powers of the court of appeals under the Federal Power Act were inadequate to provide the necessary relief which was granted in this case, that power was amply provided by the Administrative Procedure Act.

It is clear, furthermore, that this Court did not restrict the principles of the *Ford Motor Company* case to the terms of the NLRA alone. Instead the court said

> "There is nothing in the statute, *or in the principles governing judicial review of administrative action,* which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure . . ." (305 US at 375) (Emphasis supplied).

The courts of appeals have never considered the principles of the *Ford Motor Company* case as restricted to the NLRA. In *Fleming* v. *Federal Communications Commission,* 225 F.2d 523 (CADC 1955), the court applied the language of the *Ford Motor Company* case to a Federal Communications Commission appeal, stating that a reviewing court

> "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,— to secure a just result with a minimum of technical requirements." (225 F.2d at 526)

The court went on to say:

> "These principles are not limited to cases in which an agency has made inadequate findings. They extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result.'" (*id.*)

The power of the court to grant equitable relief in a Federal Power Commission case was recognized in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F.2d 921, 924 (CADC 1958), where, on a petition for review of a Federal Power Commission order (under the companion statute, the Natural Gas Act) the court said:

> "Parties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review. As it is principally the protection of the public interest with which we are here concerned, no artificial restrictions of the court's power to grant equitable relief in the furtherance of that interest can be acknowledged."

The courts have not hesitated to provide retroactive relief in order to avoid injustice resulting from an administrative error. In *Tennessee Valley Municipal Gas Association* v. *Federal Power Commission,* 470 F.2d 446 (CADC 1972), the court held that the Commission erred in refusing to re-open an order upon the application of a customer of the regulated natural gas pipe line. In fashioning its remedy for the Commission's action, the court ordered refunds so as to place the customers in the same position they would have occupied had the agency error not been made. It held that this remedy was necessary

> "If the policy of the Natural Gas Act is not arbitrarily to be defeated by uncorrected Commission error . . ." (470 F.2d at 452).

In a case directly in point, *Mississippi River Corp.* v. *Federal Power Commission,* 202 F.2d 899 (CA3, 1953), the court considered a Federal Power Commission order which unlawfully precluded the regulated pipe line from increasing its rates by rejecting the company's rate filing without a hearing. The court ruled that the rejection order was invalid. This placed the proceedings in precisely the same procedural status as the instant case: under the corresponding provision of the Natural Gas Act (Sec. 4, 15 USC Sec. 717c), in the absence of a valid suspension order issued within thirty days of the filing, the new rates automatically went into effect, not subject to refund. Nevertheless, the court refused to allow the pipe line to retroactively increase its rates from the proposed effective date thereof. In a set of circumstances identical to those of the instant case, the court pointed out that to increase the charges retroactively would force customers of the pipe line to pay added charges for gas already resold to the ultimate purchasers on the basis of the pipe line's lower rate. The court could find "nothing in the statute that sanctions such a course." Accordingly, the court fashioned a remedy, which placed the parties in the same situation as if the Commission had issued a standard suspension and refund order.

The Natural Gas Act cases above discussed are applicable here, because the review provisions of that Act are substantially identical to those of the Federal Power Act (Natural Gas Act, Sec. 19, 15 USC Sec. 717r; Federal Power Act, Sec. 313, 16 USC Sec. 825 1).

Arrow Transportation Company is not in point.

Petitioner's reliance on the case of *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963), is clearly misplaced. In that case, the district court had attempted to tack on a further suspension of a rate increase *after the end of the seven-month suspension* which was provided for by the Interstate Commerce Act and which had been ordered by the Interstate Commerce Commission. This Court simply held that the court could not extend the maximum statutory period of suspension. In the present case, the maximum statutory period of suspension is five months (Federal Power Act, Sec. 205 (e), 16 USC Sec. 824 d (e)). The total suspension allowed by the Court of Appeals was for a period of five months from the effective date of the new rate filing (i.e., from July 14, 1972 to December 13, 1972). This is precisely the relief which I&M asked the Commission to grant to it. There is no similarity whatsoever to the situation in *Arrow Transportation Company*.

CONCLUSION

The result reached by the Court of Appeals in the instant case is in accord with a direct line of cases extending back for many years. It carriers out the precise course of action contemplated by the Federal Power Act and normally pursued in administrative proceedings under that Act. The court's remedy was the only possible solution which could avoid a totally undeserved windfall to the company and a grossly inequitable disaster to the customers of the electric utility.

There is no error in the action of the Court of Appeals, and no reason for a grant of certiorari by this Court.

Wherefore the IMMDA respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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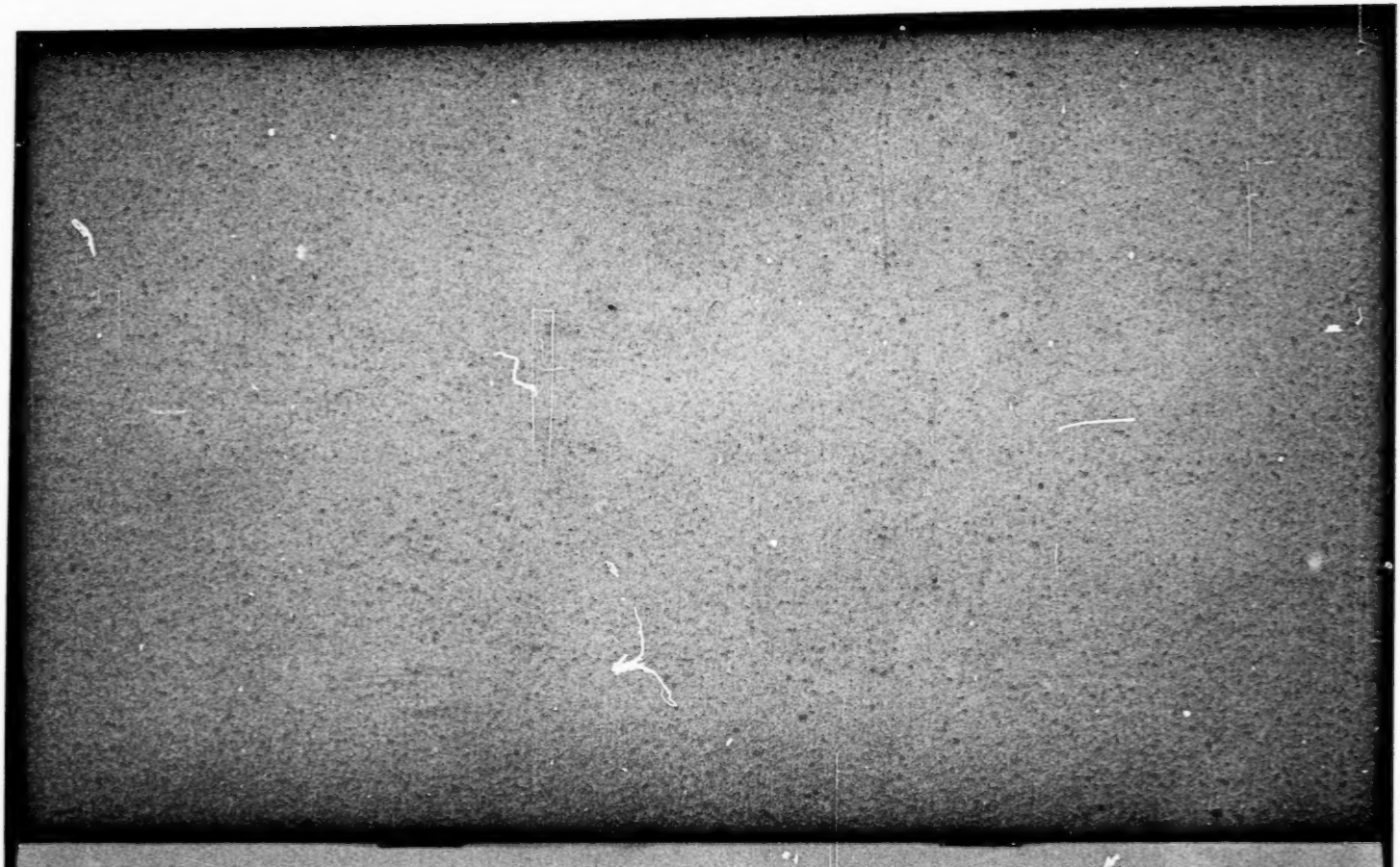

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FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT CITY OF AUBURN, INDIANA IN OPPOSITION

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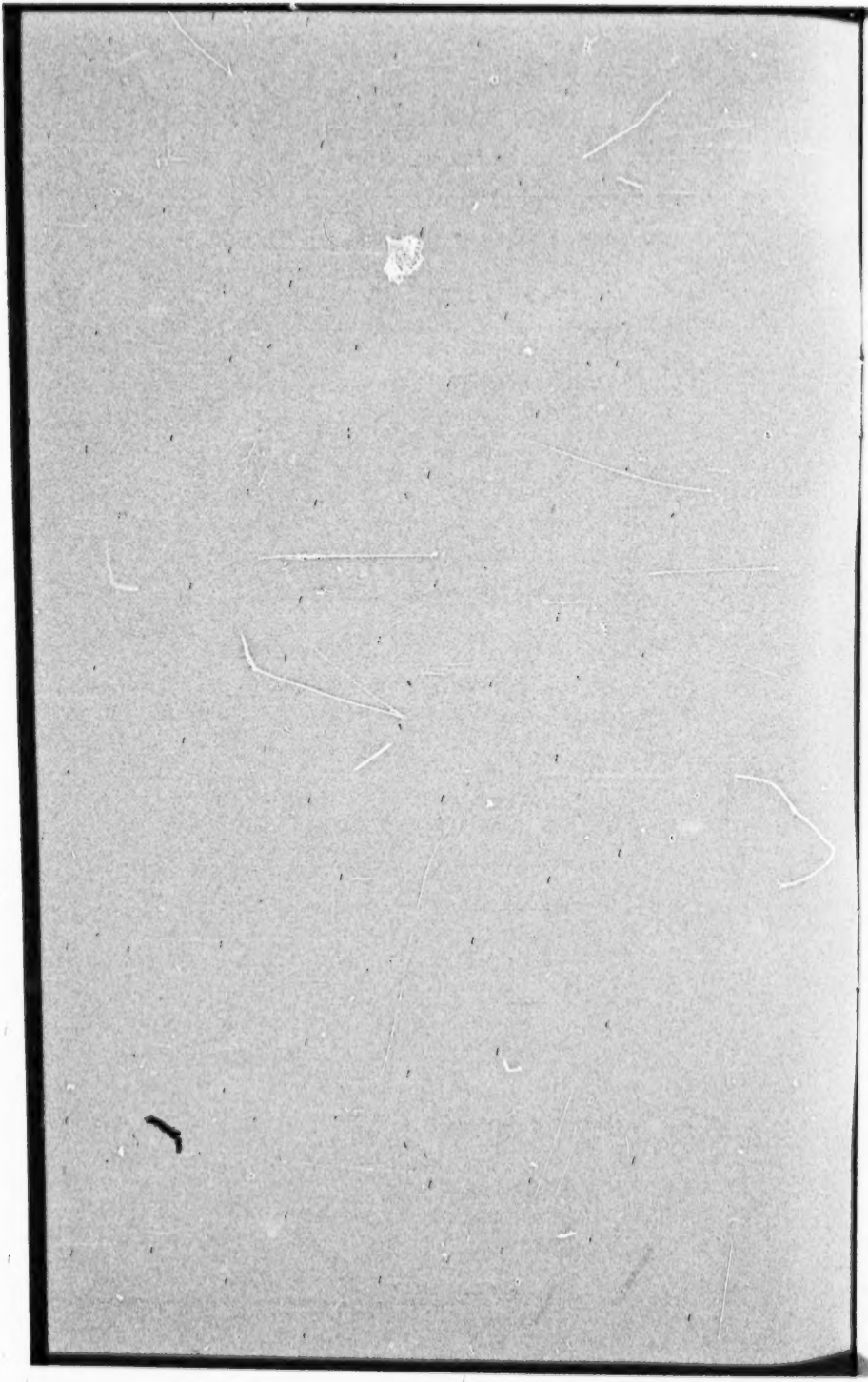

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT CITY OF AUBURN, INDIANA * IN OPPOSITION

---

* The City of Auburn, Indiana has been a member of the Indiana & Michigan Municipal Distributors Association, one of the Respondents herein. Auburn, however, relinquished its membership in the Association and the undersigned entered an appearance on behalf of Auburn before the Court of Appeals during the pendency of this dispute. Following the initial decision of the Court of Appeals, Auburn filed a Petition for Rehearing and Suggestion for Rehearing In Banc on its own behalf. See *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 343, fn. 1 (D.C. Cir., 1974).

OPINIONS BELOW

The opinion, judgment and order of the United States Court of Appeals to which the Petition for a Writ of Certiorari is directed are accurately and adequately set forth in the Appendix filed by the Petitioner at pp. 1a-27a. The decision is now reported as *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir., 1974).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court below properly modified its original decision and opinion in light of the clear equities prevailing between the parties?
2. Whether this Court need intercede in the relationship of the litigants in light of the fact that the dispute is episodic, of significance only to the litigants herein, and will not occur again?

STATUTES INVOLVED

The issues posed in the Petition for a Writ of Certiorari involve Sections 205, 206 and 313 of the Federal Power Act, 16 U.S.C. Section 791, *et seq.*, pertinent portions of which have been set forth by the Petitioner in the Appendix at pp. 51a, 53a and 54a, respectively.

COUNTERSTATEMENT OF THE CASE

The present Petition represents the second time that the Petitioner, Indiana & Michigan Electric Co. (hereinafter I&M), has been before this Court seeking relief from opinions and judgments of the United States Court of Appeals for the District of Columbia Circuit involving the same (or nearly so) parties and orders of the Federal Power Commission (hereinafter Commission) in the

same proceeding. *See Richmond Power & Light* v. *FPC*, 481 F.2d 490 (D.C. Cir., 1973), *cert. denied sub nom., Indiana & Michigan Electric Co.* v. *Anderson Power & Light*, 414 U.S. 1068 (1973).

In *Richmond*, this Court refused to review a determination that I&M was precluded from filing unilateral rate increases with the Commission where certain of its wholesale customers purchase electric energy pursuant to contract. *See, United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Here I&M again seeks review by this Court of a decision wherein I&M was granted the precise relief it requested from the Commission in its challenge to the legality of the Commission's initial action.

I&M's Statement of the Case and description of the decision of the Court of Appeals misleads, in that it is incomplete. The Court of Appeals, in its initial decision, had held that the Commission's so called 60-day filing regulation, 18 C.F.R., Section 35.13(b)(4)(i) was illegal and *ultra vires* since it illegally expanded the 30-day notice requirement of Section 205(d) of the Federal Power Act. *Cf., Municipal Light Boards* v. *Federal Power Commission*, 450 F.2d 1341 (D.C. Cir., 1971), *cert. denied*, 405 U.S. 989 (1971). The Court stated:

> Because the Commission lacked statutory authority to delay the effective date of I&M's filing until 13 August 1972 and to suspend the new rates until 13 January 1973, we vacate the Commission's order of 11 August 1972 and remand to the Commission with instructions that I&M's 13 June rate filing be given effect as of 14 July 1972. (502 F.2d at 339.)

As a corollary to its holding, the Court of Appeals opined that I&M would be entitled to collect from affected customers the difference between the increased rates and

the rates actually charged for the period July 14, 1972 to January 13, 1973, or *six months.*

In doing so, the Court overlooked two basic facts. First, I&M in its petition for rehearing of the Commission's Order of August 11, 1972, requested only that the Commission:

> (i)ssue a supplemental order modifying ordering paragraph (s) of its August 11, 1972 Order in this proceeding, so as to provide that I&M's proposed rate schedules are suspended for five months beginning July 14, 1972 and their use deferred until December 14, 1972 . . . (502 F.2d at 346.)

I&M's request, if accepted, would have meant only a *one month* incremental levy against affected customers and the rate increase would have been subject to refund. Second, a six-month levy against affected customers would have resulted in a windfall to I&M of millions of dollars; revenues which I&M never requested from the Commission in its petition for rehearing and revenues which, as the Commission found, I&M was not entitled to under its rate filing. Affidavits from representatives of the affected customers made it clear to the Court of Appeals that its initial decision, if allowed to stand, would imperil the very existence of those customers. 502 F.2d 344, fn. 5.[1]

Under these circumstances, then, it is submitted that the Court of Appeals had no choice but to modify its initial decision to accurately reflect and accommodate the equities between the parties. The Court of Appeals recognized that it was Commission error that led to the

[1] The Court of Appeal's initial decision would have imposed still another onerous burden on affected customers: I&M's clearly excessive rate filing would not have been subject to refund under Section 205(e) of the Federal Power Act following conclusion of hearings thereon. Over two and one-half years have passed since I&M's filing and proceedings have not yet concluded.

dispute, and that its initial decision gave I&M more than it ever requested before the Commission. As will be seen, under the unique circumstances of this case there is no need for this Court to intercede. The Court of Appeals was correct both on the facts and in interpreting and applying its equitable powers.

ARGUMENT I

THE MODIFICATION OF THE ORIGINAL DECISION WAS A PROPER EXERCISE OF THE EQUITABLE POWERS OF THE COURT OF APPEALS

There is and can be no dispute as to where the equities lie as between I&M on the one hand, and affected customers on the other.

In its Petition, I&M neither alludes to nor challenges the determination by the Court of Appeals that the equities clearly favor I&M's affected customers. Rather, I&M mounts a challenge to the Court of Appeal's authority to issue a remedial order based on the clear equities of this case. That challenge must fail.

While there is a paucity of decisional authority on an appellate court's equitable powers under the Federal Power Act, this Court has already held that appellate tribunals possess equitable authority to issue remedial orders under the analogous and nearly identical provisions of the Natural Gas Act.

Section 313(b) of the Federal Power Act gives the appellate tribunal authority to affirm, modify or set aside orders of the Commission. Section 19 of the Natural Gas Act vests the appellate tribunal with identical authority. 15 U.S.C. Sec. 717, *et seq.*

In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) (hereinafter *Interstate*), this Court clearly held

the rates actually charged for the period July 14, 1972 to January 13, 1973, or *six months.*

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THE MODIFICATION OF THE ORIGINAL DECISION WAS A PROPER EXERCISE OF THE EQUITABLE POWERS OF THE COURT OF APPEALS

There is and can be no dispute as to where the equities lie as between I&M on the one hand, and affected customers on the other.

In its Petition, I&M neither alludes to nor challenges the determination by the Court of Appeals that the equities clearly favor I&M's affected customers. Rather, I&M mounts a challenge to the Court of Appeal's authority to issue a remedial order based on the clear equities of this case. That challenge must fail.

While there is a paucity of decisional authority on an appellate court's equitable powers under the Federal Power Act, this Court has already held that appellate tribunals possess equitable authority to issue remedial orders under the analogous and nearly identical provisions of the Natural Gas Act.

Section 313(b) of the Federal Power Act gives the appellate tribunal authority to affirm, modify or set aside orders of the Commission. Section 19 of the Natural Gas Act vests the appellate tribunal with identical authority. 15 U.S.C. Sec. 717, *et seq.*

In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) (hereinafter *Interstate*), this Court clearly held

that an appellate tribunal is vested with equitable powers by Section 19 of the Natural Gas Act which transcend the statutory scheme established by Congress thereunder. In *Interstate*, the Commission issued a rate reduction order pursuant to Section 5 of the Natural Gas Act. The producer applied for and was granted a stay by a district court.

During the pendency of the litigation concerning the lawfulness of the Commission's rate reduction order, the producer paid excess revenues collected into the registry of the court. Following the conclusion of litigation which upheld the Commission's action, competing claims were made for disbursal of the fund. The claimants included three pipe-line companies whose excessive payments made up the fund, the local distributing companies who made payments to the pipe-line companies, and the end-use, consuming public represented by State and municipal agencies. Of the claimants, the relationship between the pipe-line and distributing companies was subject to the jurisdiction of the Commission, while the relationship between the distributing companies and their end-use customers was not subject to the Commission's jurisdiction.

The Court of Appeals held that the pipe-line companies were entitled to the refund since they had made the excessive payments. While the Court was split on how relief should be effectuated, there was agreement that the Court of Appeals should be reversed and the ultimate beneficiaries of the fund should be the end-use consumers. It is this precise group that was and is beyond the jurisdiction of the Commission.

Justice Douglas, speaking for the Court, stated:

> It is said that the federal court could not bypass the pipe-line companies without undertaking to pass on the reasonableness of the rates which they have

charged—a matter beyond its competence except on review of orders of the Commission. But it is not rate-making to determine the equity of the claim of the pipe-line companies to the fund. The federal court, through exercise of its power under Section 19 of the Act, issued the stay order under which the fund was accumulated. When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. *Inland Steel Co.* v. *United States*, 306 U.S. 153. It assumes the duty to make disposition of the fund in accord with equitable principles. *United States* v. *Morgan, supra*, at 191. (336 U.S. at 582-83).

A concurring Justice Frankfurter stated:

> It would, therefore, appear to be clear that the judicial duty is to deal fairly with a trust fund held to await the outcome of judicial review of the end that it may be distributed on the basis of what would have taken place had the Power Commission's order gone into effect at once.
>
> The task, then, for the Court of Appeals is to reconstruct, as far as it can possibly be done, what would have happened had no fund accrued. Reasons of equity produced the fund; equitable considerations must determine its distribution. The governing principle is that of unjust enrichment. *Since the task of the court is to place the parties in the position in which they would have been had there not been a postponement of the effective date of the rate-reduction, it is now the duty of the court to make that retrospective determination not by unfounded assumptions erected into rigid legal rules, but by an ascertainment of what actually would have happened contemporaneously had purchasers from Interstate obtained their gas at the lower rate.* (336 U.S. at 386). (Emphasis supplied).

Thus, it is clear that this Court has held that, under Section 19 of the Natural Gas Act, appellate tribunals

are not divested of their traditional equitable powers in proceedings arising under the Natural Gas Act. Under the *Mobile-Sierra* decisions, *supra*, the *Interstate* rational is directly applicable to proceedings arising under the Federal Power Act.

I&M's claim in its Petition that an appellate tribunal reviewing disputes arising under the Federal Power Act sits only "as a court of law rather than as a court of equity" is startling. I&M claims:

> By this section (Section 313), Congress granted the Court of Appeals jurisdiction to review orders of the FPC, but the jurisdiction conferred is precisely detailed and severely circumscribed. The court is given only the power to "affirm, modify, or set aside such order in whole or in part." Id. It is not granted any broad equitable powers such as the power to grant injunctions and restraining orders (see, e.g., Sections 314 and 317 of the Act which invest these powers in the district courts) or the power to issue such orders as to it may seem just and proper (see, e.g., Section 10(e) and (f) of the NLRA, 49 Stat. 454, 455). Therefore, although Section 313(b) of the Act provides an independent basis for the court's jurisdiction, *Congress made it abundantly clear that a court of appeals reviewing FPC action under that section sits as a court of law rather than as a court of equity.* It follows that the exercise of equitable powers in Section 313(b) proceeding is without Congressional authority. (Petition at 11.) (Emphasis supplied).

Had I&M taken the trouble to read *all* of Section 313, perhaps its view would change. Section 313(c) provides:

> (C) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. *The commencement of proceedings under subsection (b) of this section shall not, unless*

> *specifically ordered by the court, operate as a stay of the Commission's order.* (Emphasis supplied).

In *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921 (D.C. Cir., 1958), dealing with Section 19(c) of the Natural Gas Act (the counterpart to Section 313 (c)), the Court made it quite clear that, in appropriate circumstances, it has the *equitable* authority to intercede and order a stay or injunction of Commission proceedings. While the petitioner there was not successful in invoking the equitable powers of the Court, the Court clearly rejected a Commission challenge to its *equitable jurisdiction.* 259 F.2d at 924.

I&M is aware of the *Virginia Petroleum* decision and its applicability to the Federal Power Act. In the *Richmond* dispute, *supra*, one of the petitioners there (Anderson Power & Light of the City of Anderson, Indiana) attempted to invoke the equitable jurisdiction of the Court on January 2, 1973, when it filed a motion for a stay of the disputed orders of the Commission. Both the Commission and I&M resisted the motion on the ground, *inter alia*, that the movant could not show the requisite *irreparable injury* as required by the Court in *Virginia Petroleum.*

I&M also challenges the Court of Appeal's interpretation of this Court's decisions in *United States* v. *Morgan*, 307 U.S. 183 (1939) and *Ford Motor Corp.* v. *NLRB*, 305 U.S. 364 (1939). *See*, I&M Petition at 9-19. It is submitted that I&M's interpretation of these decisions is incorrectly restrictive, ignores the plain words used by this Court in each, and disregards subsequent interpretations of both by recognized experts in the field.

In *Morgan*, this Court stated:

> Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having pro-

> hibited and declared unlawful any unjust or unreasonable rate, *a court of equity should be astute to avoid the collection of unlawful rates* . . . (307 U.S. at 194). (Emphasis supplied).

In the present instance, I&M attempted to use the process of the Court of Appeals to collect, for the full suspension period, rates found to be clearly excessive by the Commission without first having informed the Commission or the parties of its intent to so do in its petition for rehearing. It was clearly not error for the Court of Appeals, under these circumstances, ". . . to avoid the use of its process to effectuate the collection of unlawful rates."

In *Ford Motor Corp.*, this Court stated:

> (W)hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. *The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.* (305 U.S. at 373). (Emphasis supplied).

Here, I&M wholly ignores the principles enunciated in *Ford Motor Corp.* I&M argues for a clearly *unjust* result based on a clearly restrictive and *technical* reading of the Federal Power Act.[2]

Professor Kenneth Davis, in his Treatise on Administrative Law, forcefully indicates that *Morgan* and *Ford* support a broad theory of equitable power. Professor Davis states:

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[2] While I&M may believe the Court of Appeals has "intrude(d) upon the administrative processes" in its decision, the Commission itself does not share this view as evidenced by its support of the Court's action.

> The Supreme Court has declared that a proceeding in the Court of Appeals on a petition for review is controlled by equitable principles and the court has equity power, even though the statute does not explicitly so provide. (3 K. Davis, Administrator Law Treatise. Sec. 23.03 (1958)).

As sufficient support for the above broad proposition, Professor Davis cites *Morgan* and *Ford*, *Ibid.* at 304, fn. 32 (1958). The Court of Appeals' interpretation of *Morgan* and *Ford* therefore is clearly consonant with this view.

Finally, I&M, in Point III of its Petition attempts to convince this Court that the equitable action taken by the Court of Appeals departed from the permissible scope of administrative review. The three cases primarily relied upon by the petitioner do not support petitioner's contention.

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952), considered the powers vested in the Court of Appeals by Section 313(b) of the Federal Power Act. As stated hereinabove, this Section grants the Court of Appeals the power to "affirm, modify, or set aside in whole or in part" an FPC order. I&M highlighted portions of this Court's opinion stating that the Court of Appeals' power "is not the power to exercise on essentially administrative function." *See*, I&B Petition at 23, *citing*, *FPC* v. *Idaho Power*, *supra* at 21. Auburn does not quarrel with this proposition.

However, a brief analysis of the facts in *Idaho Power* shows that the Court of Appeals there, rather than implementing the decision of the FPC, had "usurped the administrative function" by substituting its own judgment for that of the administrative agency. This Court properly recognized that the discretionary decisions delegated by Congress to agencies should not be second guessed by a Court of Appeals, since an appellate tri-

bunal is inherently limited in any administrative decisional process by a lack of expertise and proper fact finding procedures. 344 U.S. at 21.

However, that is not the situation in the instant litigation. Here, the Court of Appeals did not second guess or usurp the administrative function. It rather implemented the decision of the FPC by use of its equitable powers. The doctrine of judicial restraint laid down in *Idaho Power* has not been violated by the Court of Appeals' action in this case. I&M's reliance on *Idaho Power* is conceptually misplaced.

Two additional cases primarily relied upon by the petitioner in this action are *Alaska Steamship Co.* v. *FMC*, 362 F.2d 406 (9th Cir., 1966) and *Phillips Petroleum Co.* v. *FPC*, 227 F.2d 470 (10th Cir., 1955). These two cases deal with situations where, because of procedural errors, the administrative agencies involved lost power to suspend rates or take certain action. The two Courts of Appeals refused to correct the effect of the procedural error by injunctive remedy. However, neither court anywhere indicated that it was *without power to so act.* The rationale of these decisions is unclear. It can be postulated that each court simply found that the equities were not as heavily weighted in favor of the parties requesting relief as they are here in the immediate case. It is certainly not clear, as I&M contends, that each court felt that it lacked jurisdiction to act. These cases are wholly insufficient, therefore, to show that Section 313(b) of the Federal Power Act extinguishes the traditional equity power of the courts.

This Court has stated that the federal court's equitable powers should not be restricted without clear legislative intent to do so. *Mitchell* v. *De Maris Jewelry, Inc.*, 361 U.S. 288, 291 (1960). This Court has also indicated the value of equitable jurisdiction in *Porter* v. *Warner*

Holding Company, 328 U.S. 895, 398 (1946), where it stated:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction. (Citations omitted).

The equitable action of the Court of Appeals under the Federal Power Act is clearly supported by decisional authority under the Natural Gas Act and is consistent with principles established by this Court. The action of the Court of Appeals below, therefore, does not deserve nor require review by this Court.

ARGUMENT II

SINCE SUFFICIENT DOCTRINAL JUSTIFICATION EXISTS FOR THE DECISION OF THE COURT OF APPEALS, AND SINCE THE DISPUTE HERE IS EPISODIC, OF SIGNIFICANCE ONLY TO THE LITIGANTS, AND WILL NOT OCCUR AGAIN, THIS COURT NEED NOT INTERCEDE IN THE RELATIONSHIP OF THE LITIGANTS

A long line of cases decided by this Court has indicated that the discretion to issue a Writ of Certiorari should be exercised sparingly and with great caution. Particularly in instances where there is no inter-court decisional conflict, the writ should be issued only where, for instance, there exists an important question of law which is of a recurring nature. *Glus* v. *Brooklyn E. Terminal Co.*, 359 U.S. 231 (1959); *Ex Parte Law Ow Bew*, 141 U.S. 583 (1891). In order to conserve judicial

time and energy, this Court has wisely determined that, where the discretionary writ is the avenue of Supreme Court review, cases which are of significance solely to the litigants before the Court should not be reviewed. *See, e.g., Rudolph* v. *United States*, 370 U.S. 269, 270 (1962); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 78 fn. 2 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

I&M here seeks review by this Court of a conflict which will not again arise. The Court of Appeals held the Commission's 60-day filing regulation illegal and *ultra vires*. The Commission itself agreed with that decision in its petition for rehearing and the intervenors, who did not concede the point, nevertheless do not seek review of that portion of the Court of Appeals' decision here.

As indicated in the Counterstatement of the case, the need for the equitable action taken by the Court of Appeals in the petition for rehearing arose as a result of the reliance of the Commission and the intervenors upon the sixty-day filing regulation of the Commission. 18 C.F.R. Section 35.13(b)(4)(i) (1973). The Commission delayed its order of a five-month suspension of I&M's proposed rates until after the statutory thirty-day time limit had elapsed. Although the sixty-day regulation had been in effect for a considerable period of time and had been recognized *sub silentio* as being valid, the Court of Appeals declared the sixty-day filing requirement unlawful. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir., 1974) (sixty-day regulation unlawful); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir., 1971), *cert. denied*, 405 U.S. 989 (1972) (*sub silentio* approval of regulation).

The effect of holding the regulation unlawful was threefold. First, I&M's proposed rates were held to have become effective thirty days after the original I&M filing and before the Commission's suspension order. Second,

the Commission was powerless to order the five-month suspension which it had deemed proper. Third, the Commission was deprived of authority to order refunds by I&M to its customers. *See, Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 344 (D.C. Cir., 1974).

This inequitable situation arose in part because of the Commission's reliance upon the validity and legality of its sixty-day filing requirement and in part because of I&M's failure to raise all jurisdictional issues before the Commission. The decision by the Court of Appeals declaring the regulation unlawful has the natural and intended effect of forcing the Commission, in the future, to make all necessary decisions within the statutory thirty-day limit. This decision has the further effect of serving as a warning to future litigants that they will be awarded only the relief requested before the Commission.

Thus, the Commission, whose responsibility encompasses ruling upon the legality of proposed rate changes, will no longer defer a preliminary decision and suspension order past the thirty-day time limit since to do so would result in the immediate application of the new rate and in the loss of the Commission's jurisdiction to subsequently review that rate and, in appropriate cases, order refunds. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d at 345.

A Court of Appeals, then, will not have the occasion in the future, to use its equitable powers to order that the effective date of the new rate be postponed for equitable reasons. Hopefully, the Commission, to preserve its own jurisdiction over the rate proceeding, will have determined the justification for and length of a suspension within the allotted thirty-day period and will not lose its jurisdiction and authority out of reliance upon the now ineffectual sixty-day filing requirement.

Under the narrow and limited circumstances of this case, the exercise of this Court's discretion should not result in the issuance of a Writ of Certiorari in this case. *Cf. Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923). As this Court pointed out in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.

I&M's stance in the instant litigation is clearly episodic and not likely to recur. Further, the interests here are solely those of the litigants. In the circumstances of this case, where there exists sufficient doctrinal authority for the decision below, there is no sufficient basis for invoking the jurisdiction of this Court.

ARGUMENT III

THE COURT OF APPEALS DECISION HERE IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *ARROW TRANSPORTATION COMPANY* V. *SOUTHERN RAILWAY COMPANY*, 372 U.S. 658 (1963)

I&M placed great reliance in its Petition on this Court's holding in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963) (hereinafter referred to as *Arrow*). *See*, I&M Petition at 19-22. This reliance is wholly unfounded in light of factual distinctions between *Arrow* and the instant litigation. These factual disparities go to the core of this Court's reasoning in *Arrow*, thus rendering *Arrow* inapplicable to this litigation.

The controversy in *Arrow* arose following a proposal by Southern Railway and several other carriers for a reduction of their freight rates. The ICC, pursuant to statutory authority, suspended the proposed rate for the maximum allowable period of seven months while the Commission sought to reach a decision on the appropriateness of the proposed rate. 372 U.S. at 659-60; 49 U.S.C. Section 15(7) (1970) (ICC suspension power). The Commission failed to reach a decision within the suspension period and an additional extra-statutory five-month rate suspension was agreed to by the respondent carriers. *Ibid.* at 60.

At the expiration of this additional time period, the Commission still not having reached a decision, the plaintiffs in *Arrow* instituted injunctive proceedings in the district court for yet another suspension. The district court, Court of Appeals and this Court decided that the seven-month suspension period had been Congressionally determined as the maximum time for the suspension of rates and thus, the district court was powerless to grant injunctive relief. *Ibid.* at 661-62.

This brief analysis of the *Arrow* factual situation exposes the two basic distinctions which render *Arrow* inapplicable to the instant litigation. First, the petitioners in *Arrow* sought a suspension of the time of rate effectiveness which was *longer* than the maximum time period allowable by the statute. In the instant proceeding, the Court of Appeals reaffirmed that the five-month suspension period under the Federal Power Act must be adhered to. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d at 344.

Second, the petitioners in *Arrow* sought the extended suspension period in the absence of any indication by the ICC of the appropriateness or necessity of the extra suspension. The district court, in effect, was asked to sit as the administrative agency and balance the numer-

ous factors normally delegated to the discretion of the ICC. Here, however, the Court of Appeals merely implemented, on equitable grounds, the carefully and conclusively determined Commission decision of the need and appropriateness of rate suspension.

This Court, in *Arrow* emphasized the illegality of extending the time period of the suspension *beyond* the statutory maximum. This Court, citing the Court of Appeals decision in *Arrow* stated that, "Congress, in its wisdom has fixed seven months as the *maximum period* of suspension. It seems clear to us that if the courts extend that period they are in effect amending the statute and that is a matter beyond their power." 372 U.S. at 662, *quoting Arrow Transportation Co.* v. *Southern Railway Co.*, 308 F.2d 181, 186 (5th Cir., 1962) (Emphasis supplied). The Court in Arrow further indicated the importance of the time period of the suspension by closely analyzing the legislative history of the determination of the seven-month maximum ICC suspension period and determining that the seven-month maximum must be adhered to. 372 U.S. at 662-666.

Thus, *Arrow*, properly read, shows this Court's aversion to federal court rate suspension *beyond* the statutorily determined maximum by injunctive order. In its August 14 decision, the Court of Appeals correctly adhered to the maximum period of suspension imposed by the statute and did not raise the troubling issue of judicial alteration by injunctive fiat of a Congressionally determined regulatory scheme.

The second factor clearly distinguishing *Arrow* from the present litigation concerns the role of the federal courts *vis-a-vis* the jurisdiction of the agencies involved in these two cases. In *Arrow*, the district court was asked to extend the suspension period in the absence of a determination by the ICC that the extended suspension period was necessary. The district court in *Arrow* would

then have had to assume the role of the ICC and make a discretionary decision concerning the need for the suspension without the expertise and fact-finding facilities of the ICC. This Court recognized the dangers of judicial usurpation of administrative roles and condemned the action stating:

> Our conclusion from the history of the suspension power is buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy. A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. (372 U.S. at 669-671.) (footnotes omitted).

These dangers which clearly demand judicial restraint are *not* present in the instant litigation. The Court of Appeals here did not assume the role and duties of the Commission. The Commission, after fact finding and due consideration, determined that the suspension of the excessive rates requested by I&M was proper and, in its exercise of discretion, ordered the suspension. The Court of Appeals did *not* question this judgment. The court simply implemented it. Thus, the Court of Appeals did not intrude upon the administrative domain and made

no independent appraisal of the reasonableness of the rate.

Rather, the Court of Appeals, based upon the FPC finding of the need for suspension, examined the judicially manageable considerations of imminence and irreparable harm and implemented the decision of the Commission in light of equitable considerations.

The determinative factors of *Arrow*, thus, are not present in this case. The Court of Appeals' August 14 decision merely implemented an agency decision which called for suspension of rates within the metes and bounds of the time periods of the statutory scheme. The reliance of I&M on *Arrow* in Point II of its Petition is, therefore, clearly unfounded.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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I, Wallace L. Duncan, hereby certify that on December 11, 1974, the Brief for Respondent in Opposition in the above-captioned proceeding was served upon counsel by mailing a copy by first class mail, postage prepaid, as follows:

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December 11, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-571

INDIANA AND MICHIGAN ELECTRIC COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 16a-27a) and its opinion on rehearing (*id.* at 1a-13a) are reported at 502 F.2d 336. The principal order of the Federal Power Commission (*id.* at 28a-38a) and its order denying rehearing (*id.* at 39a-50a) are reported at 48 FPC 304 and 740, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on February 14, 1974. The court's order on rehearing (*id.* at 1a-2a) was entered on August 14, 1974. The petition for a writ of certiorari was filed on November 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals exceeded its reviewing authority by invoking its equity powers to fashion a remedy that would minimize the hardship to the affected public that might otherwise have resulted from its holding in this case.

2. Whether the court's order improperly interfered with the Federal Power Commission's exclusive rate suspension and rate review powers under the Federal Power Act.

STATUTES INVOLVED

The pertinent portions of Sections 205, 206, and 313 of the Federal Power Act, as amended, 16 U.S.C. 824d, 824e, and 825*l*, are set forth at Pet. App. 51a-56a.

STATEMENT

1. On June 13, 1972, petitioner filed new tariff sheets with the Federal Power Commission, pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, proposing increased rates for sales of electric energy to its wholesale customers. Petitioner submitted all of the supporting evidentiary material required by the Commission's regulations under the Act (18 C.F.R. 35.0, *et seq.*), and it requested that its proposed rate increases be given an effective date of July 14, 1972.

On July 3, 1972, the Secretary of the Commission informed petitioner by letter that, under 18 C.F.R. 35.13 (b)(4)(i), the earliest date on which the company's proposed rate increase could be placed into effect was August 13, 1972. That section of the regulations requires that utilities seeking to increase their rates must file certain cost of service data and other documentary material with the Commission at least 60 days in advance of the proposed effective date of their new rates.

On August 11, 1972, the Commission issued the first of the orders involved in the present case, accepting petitioner's new tariff sheets for filing, suspending their effectiveness for five months until January 13, 1973, and scheduling a formal hearing on the lawfulness of the proposed increase (Pet. App. 28a-37a). Petitioner sought rehearing of the August 11 order, arguing that the 60-day regulation was unlawful because, as a practical matter, it enlarged the notice period for the effectuation of proposed increased rates beyond the 30 days specified in Section 205(d) of the Act, 16 U.S.C. 824d(d). Petitioner asked that the Commission modify its earlier order to provide that the prescribed five months' suspension of its rates begin on July 14, 1972, thus permitting petitioner to begin collecting the new rates, subject to refund, on December 14, 1972. The Commission denied rehearing in all respects (Pet. App. 38a-45a).

2. On review, the court of appeals found that "the practical effect of the section [the 60-day regulation] is to impose a *de facto* 60-day notice requirement on utilities seeking to increase their rates. Such a requirement contravenes the terms of Section 205(d) of the Federal Power Act" (*id.* at 22a-23a). Under that Section, the court held (*id.* at 25a):

> [Petitioner] was entitled to an effective date of 14 July 1972 for the rate schedule it filed on 13 June. The Commission therefore acted unlawfully by delaying the effective date until 13 August.

The court recognized, as had the Commission, that the Commission has no power under the Act to suspend rates which have already gone into effect (*id.* at 26a). It therefore held that, since "the lawful effective date of [petitioner's] rate filing was 14 July 1972, the Commis-

sion had no authority to suspend use of the new rate schedule on 11 August 1972," and the "suspension order of that date must be vacated" (*id.* at 27a).

3. In response to petitions for rehearing filed by the Commission and several intervenors, the court of appeals, in the exercise of its equity powers, modified its opinion to avoid the inequitable consequences that its initial order would have had. Under the original order, petitioner would have been free to collect the increased rates from its customers retroactively from July 14, 1972, without risk of refund obligations even if the Commission later determined that a portion of the increase was unjust and unreasonable.

The result would have been inequitable in two respects. First, permitting retroactive collection of the higher rates during the entire five months' suspension period "would create considerable hardship for [petitioner's] customers, for, in reliance on the Commission's suspension order, they failed to seek increases in their own rates to offset [petitioner's] increased charges" (*id.* at 3a-4a). Since those customers could not themselves raise their rates retroactively, "our original order would force them to absorb out of their own current assets the five months of retrospective increases in [petitioner's] rates" (*id.* at 4a). That would "impose a significant burden on the finances of [petitioner's] customers" (*ibid.*).

Second, since the Commission would be without power to order refunds of charges collected subsequent to the suspension period, petitioner's customers, and ultimately the consuming public, "would be forced to pay possibly excessive rates from 13 January 1973 until the conclusion of the Commission's ongoing hearings without any prospect of receiving refunds of the excessive amounts paid" (*id.* at 6a).

On the other had, the court found, "the equitable stake of [petitioner] in our main opinion is not significant," since it had originally "sought from the Commission no greater relief than our modified order now grants" (*id.* at 7a).

The court accordingly modified its original order to "reinstate the suspension of [petitioner's] rates for the period from 14 July 1972 through 13 December 1972, and restore to the Commission its power under Section 205(e) to order refunds of any amounts paid by [petitioner's] customers after 13 December 1972 that the Commission finds excessive" (*ibid.*). The court, relying on this Court's decisions in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, and *United States* v. *Morgan,* 307 U.S. 183, reasoned that the modification was a reasonable exercise of the equity powers it possesses as a court sitting in review of an agency order (*id.* at 7a-13a).

ARGUMENT

1. Petitioner contends (Pet. 9-19, 23-25) that the court of appeals exceeded its authority as a reviewing court by invoking equity powers not conferred upon it by the Federal Power Act. Section 313(b) of the Act, 16 U.S.C. 825*l*(b), however, provides that a court of appeals reviewing an order of the Commission "shall have jurisdiction * * * to affirm, modify, or set aside such order in whole or in part." Just last Term this Court held, under the identical language of Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), that "[t]his jurisdiction to review the orders of the Commission is vested in a court with equity powers" (*Mobil Oil Corp.* v. *Federal Power Commission,* 417 U.S. 283, 311).[1]

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[1]The Court in *Mobil* upheld the authority of a court of appeals simultaneously to affirm an order of the Commission and to authorize the Commission in its discretion to reopen and reconsider the order if new information made it appropriate to do so. The Court recognized that "the Commission could not have reopened the order on its own" if the court of appeals' affirmance had been unqualified (417 U.S. at 310).

That is the controlling consideration in the present case. It was a proper exercise of the court of appeals' reviewing authority to fashion a remedy that would equitably accommodate the interests of persons affected by its decision. Petitioner does not claim that the court's order on rehearing is in fact inequitable or that it fails to put petitioner in the position the company would have occupied in the absence of the Commission's invalidated regulation.

2. Petitioner argues (Pet. 19-22), however, that the court's order impermissibly interferes with the Commission's exclusive authority to suspend proposed rate increases and to determine whether such rates are just and reasonable.

As the court of appeals correctly stated, however, "[t]he Commission explicitly determined that suspension was appropriate but failed to issue its suspension order in a timely fashion" (Pet. App. 10a-11a). Thus, far from interfering with the Commission's discretionary suspension power, the court's order "gives effect to the Commission's decision that suspension was appropriate" (*id.* at 10a-11a, n. 20). Unlike the situation in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, on which petitioner relies, the effect of the court's order in this case is not to extend the five-month suspension period provided for by statute but rather to effectuate the Commission's determination to invoke its suspension authority for the maximum five-month period.

Similarly, the court's order does not invade the Commission's province to apply the statutory just and reasonable standard. To the contrary, the court "merely provided that if the Commission subsequently determines that the filed rates are unjust or unreasonable, it may order [petitioner] to refund the excess amounts paid by its customers" (*id.* at 11a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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